TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~480~~. ~~245~~ 60

THE UNITED STATES, APPELLANTS,

vs.

JOSEPH W. PRICE.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 29, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 480.

THE UNITED STATES, APPELLANTS,

vs.

JOSEPH W. PRICE.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition of claimant	1	3
Answer of defendants	3	4
Judgment of the court	4	4
Application for, and the allowance of, appeal	5	4
Finding of facts and conclusions of law on which the judgment of the court is founded	6	5
Certificate of the chief justice of the Court of Claims that the judgment will affect a class of cases	7	5
Certificate of the chief clerk of the Court of Claims	8	5

1 United States Court of Claims, December term, 1867.

JOSEPH W. PRICE
vs.
THE UNITED STATES.

Petition.

To the honorable the judges of the Court of Claims:

The petition of Joseph W. Price, of Adel, in the county of Dallas, and State of Iowa, respectfully represents—

That on the 24th day of November, 1862, your petitioner resided, and still continues to reside, at Adel, in the county of Dallas, and State of Iowa, which said place is distant thirteen hundred miles from the city of New York, estimated by the shortest traveled route.

That on the day and year aforesaid, at Davenport, in said State of Iowa, your petitioner was duly mustered into the military service of the United States as a first lieutenant in the 39th regiment of Iowa volunteers, his place of enrollment being Adel aforesaid.

That he continued in said military service, in the performance of the functions and duties of a first lieutenant, from the date aforesaid until the 6th day of January, 1865, when he was honorably discharged from said military service; that his term of enlishment was for three years, or during the war, and his discharge was granted at his own request, in a letter of resignation.

That he was mustered out of service at Savannah, in the State of Georgia, and was furnished transportation by the government, on his way homeward, as far as the city of New York, but no farther.

That by reason of the premises, and of the acts of Congress fol-
2 lowing, to wit, the twenty-fifth section of the act approved March 3, 1799; the twenty-fourth section of the act of March 16, 1802; the twenty-second section of the act of January 11, 1812; the fifteenth section of the act of January 29, 1813; the third section of the act of March 19, 1836; the fifth section of the act of July 22, 1861, and the fourth section of the act of July 29, 1861, your petitioner is entitled to receive from the United States the sum of two hundred and thirty-four dollars, as traveling allowances from the city of New York to Adel, in the State of Iowa—the same being one day's pay, subsistence, and other allowances due to his rank for each twenty miles travel, and the distance being thirteen hundred miles as aforesaid.

That your petitioner has applied to the Pay Department of the United States Army for payment of the amount so due, but payment of the same, or any part thereof, was refused by said department.

That your petitioner has always borne true allegiance to the government of the United States, and has never in any way voluntarily aided, abetted, or given encouragement to the rebellion against said government; and, further, that he is a citizen of the United States.

Your petitioner, therefore, claims that there is due him from the United States the sum of two hundred and thirty-four dollars, and for that amount he respectfully claims judgment.

CHIPMAN & HOSMER,
Claimant's Attorneys.

DISTRICT OF COLUMBIA, *Washington County, ss:*

N. P. Chipman, of said county, being duly sworn, says that he is one of the attorneys for the petitioner in the above and foregoing petition

mentioned, and that no assignment or transfer of the claim in said petition set forth has ever been made to any person whomsoever, nor has any part thereof, or any interest therein, been assigned to any person by said claimant; that the said claimant is justly entitled to receive the amount in said petition claimed from the United States, after allowing all just credits and offsets; and that he verily believes the facts as stated in said petition to be true.

N. P. CHIPMAN.

Sworn and subscribed before me this 8th day of November, 1867.
T. J. GARDNER, *J. P.*

3 In the United States Court of Claims, December term, A. D. 1868.

JOSEPH W. PRICE. }
vs. } No. 2954.
THE UNITED STATES. }

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of two hundred and thirty-four dollars, the said defendants say they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

4 In the Court of Claims.

JOSEPH W. PRICE }
vs. }
THE UNITED STATES. }

And now, to wit, January 18, 1869, the court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Joseph W. Price do have and recover of and from the United States the sum of two hundred and thirty-four dollars ($234 00).

5 In the Court of Claims, December term, 1868.

JOSEPH W. PRICE }
vs. }
THE UNITED STATES. }

On this March 11, 1869, the United States, by their Attorney General, pray for an appeal to the Supreme Court of the United States from the decision of this court in the above-entitled case of Joseph W. Price, rendered January 18, 1869, because said judgment, the amount in controversy not exceeding three thousand dollars, will affect a class of cases.

T. LYLE DICKEY,
Assist. Att'y Gen.,
By T. H. TALBOT.

In the Court of Claims, March 11, 1869.

JOSEPH W. PRICE
vs.
THE UNITED STATES.

Ordered, that the application of the Attorney General for an appeal in this case be granted, and that the appeal be allowed.

BY THE COURT.

6 In the Court of Claims.

JOSEPH W. PRICE
vs.
THE UNITED STATES. No. 2954.

In this case the court, upon due consideration of the premises, find the following facts:

Joseph W. Price, the claimant, a loyal citizen of the United States, having tendered his resignation as first lieutenant 39th Iowa volunteers, based on surgeon's certificate of disability, was honorably discharged the service of the United States January 6th, 1865, at the headquarters department and army of Tennesee, Savannah, Ga. He had been enrolled in said service, and his residence at the time of his enrollment and of his discharge was at Adel, in Iowa. Upon his discharge he returned to Adel, without allowance of transportation pay; and the court ruled, as conclusion of law, that the claimant, upon such discharge, was entitled to transportation pay, to wit, one day's pay and allowances for each twenty miles of travel from the place of such discharge to the place of enrollment aforesaid, and accordingly gave judgment for the sum of two hundred and thirty-four dollars.

JULY 22, '69.

The within statement of facts & law is agreed to by us.
T. H. TALBOT, *for U. S.*
CHIPMAN & HOSMER, *for Price.*

7 In the Court of Claims.

Appeal to the Supreme Court of the United States.

JOSEPH W. PRICE
vs.
THE UNITED STATES.

I certify that the judgment in this case will affect a class of cases.

JOS. CASEY,
Ch. J. Court of Claims.

JULY 28, 1869.

(Indorsed:) Joseph W. Price vs. the United States. Certificate on appeal.

8 In the Court of Claims.

JOSEPH W. PRICE
vs.
THE UNITED STATES.

I, Samuel H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the

above-entitled cause, and of the final judgment of the court thereon; of the finding of the facts and the conclusions of law on which the court founded its judgment; of the application for the allowance of an appeal to the Supreme Court of the United States; of the order of the court allowing the same; & of the certificate of the Chief Justice of said court that it is a judgment affecting a class of cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 28th day of July, A. D. 1869.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

(Indorsement on record:) Court of Claims. No. 480. The United States, appellants, vs. Joseph W. Price.

Filed 29th July, 1869.

above-entitled cause, and of the final judgment of the court thereon; of the finding of the facts and the conclusions of law on which the court founded its judgment; of the application for the allowance of an appeal to the Supreme Court of the United States; of the order of the court allowing the same; & of the certificate of the Chief Justice of said court that it is a judgment affecting a class of cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 28th day of July, A. D. 1869.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

(Indorsement on record:) Court of Claims. No. 480. The United States, appellants, vs. Joseph W. Price.

Filed 29th July, 1869.

2 Stat 361

11 article 5th

12 Stat 564

ex 17 -

9 Stat

26 Sept 1850

Affidavit of honorable discharge

or Certificate

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANTS,
vs.
JOSEPH W. PRICE.
No. ~~180~~.

Brief for appellants.

In this case the appellee, while resident at Adel, in the State of Iowa, was, on November 24, 1862, there duly mustered into the military service of the United States as a first lieutenant in the Thirty-ninth regiment of Iowa volunteers, for the term of three years or during the war, and continued in said service until January 6, 1865, when, having resigned, he was at his own request, at Savannah, Georgia, discharged upon a surgeon's certificate of disability, (not of disability incurred in the service.)

For transportation pay from New York (transportation having been furnished him on government transport to New York) to Adel, the place of his enrollment, this claim was brought in the Court of Claims, and, upon decision there *pro forma* in favor of the claimant, the United States appealed to this court, the case being one of a very numerous class, and thus indirectly involving a much larger sum of money than that which is sufficient to bring a case here by appeal from the Court of Claims.

ARGUMENT.

I. Against the allowance of this as a lawful claim an irresistible argument may be found in the uniform construction given to statutes regulating this matter from the first to the last, cited by the counsel for the appellee, (March 3, 1799, to July 29, 1861,) sanctioned as that construction has been by repeated re-enactments of the same provision at different times, after the adoption and under the practice of such construction.

In the Digest of Decisions of the Second Comptroller, 1869, the following appears on page 270:

"2079. It is the established rule not to allow travel pay to officers and soldiers discharged at their own request, before the termination of their respective periods of service or enlistment." (Vol. 28, p. 633.)

As to soldiers see also page 283, paragraph 2189.

That the construction given to a statute in actual practice is of great weight, see United States Bank *vs.* Halsted, (10 Wheaton, 62, 63.)

That such construction is adopted by subsequent re-enactment of the provision construed, see Duramus *vs.* Harrison, (26 Ala., 330;) McKee *vs.* Mc Kee, (17 Md., 352;) Drennan *vs.* People, (10 Mich., 169.)

II. But the claimant is farther than this argument has supposed, by one remove, from the provision of law of which he is seeking to obtain a reconstruction in his favor. He was a volunteer officer; and in favor of volunteer officers there is in the statutes no direct allowance of travel pay from the place of discharge to the place of enrollment. The allowance is provided in terms only for officers of the regular army; volunteer officers receiving its benefits merely through that provision of the act of July 22, 1861, (XII, 269,) which places them "on the footing, as to pay and allowances, of similar corps of the regular army."

The footing thus referred to must have been that established and known since 1799, not a new footing, *now, five years after volunteer troops have ceased to be needed*, to be established in contravention of the unva-

ried practice of the government through seventy years, with all the wars of that period.

The new rule would, of course, under the provisions of section 5 of the act of July 22, 1861, avail in the case of soldiers as well as officers. Its drain upon the treasury for officers alone would be of millions; and how large would it not be if established in favor of both officers and soldiers?

A uniform construction, as old as the oldest legislation upon this subject, seems sufficient authority against opening the treasury to such a demand.

AMOS T. AKERMAN,
Attorney General.
By THOMAS H. TALBOT,
Assistant Attorney General.

Supreme Court of the United States.

THE UNITED STATES, Appellants,
vs.
JOSEPH W. PRICE.
No. 245.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR DEFENDANT.

The facts are to be found on page 5 of the record, and, being brief, we give the entire finding of the court below, both as to facts and conclusion of law:

"In this case the court, upon due consideration of the premises, find the following facts:

"Joseph W. Price, the claimant, a loyal citizen of the United States, having tendered his resignation as first lieutenant, Thirty-ninth Iowa volunteers, based on surgeon's certificate of disability, was honorably discharged the service of the United States January 6, 1865, at the headquarters department of Tennessee, Savannah, Georgia. He had been enrolled in said service, and his residence at the time of his enrollment and of his discharge was Adel, in Iowa. Upon his discharge he returned to Adel, without allowance of transportation pay; and the court ruled, as conclusion of law, that the claimant, upon such discharge, was entitled to transportation pay, to wit, one day's pay and allowance for each twenty miles of travel from the place of such discharge to the place of enrollment, aforesaid, and accordingly give judgment for the sum of $234."

The Attorney General, in his statement of the facts, remarks parenthetically that the disability of the officer was not in-

curred in the service. The record is silent as to the cause of the disability. The fact is otherwise than as stated by the Attorney General, as the record below will show; but that, not being essential, does not appear of record here. With this exception the facts as given by the Attorney General seem to state the case truly.

Statute Law and Departmental Provisions.

Section 25, act March 3, 1799, (1 Stats., 755,) provides:

"That *whenever* any officer or soldier shall be discharged from the service, *except by way of punishment for an offense*, he shall be allowed his pay and rations, or an equivalent in money, for such term or time as shall be sufficient to travel from the place where he receives his discharge to the place of his residence, computing at the rate of twenty miles to a day."

The act of March 16, 1802, (sec. 24, 2 Stats., 137,) recites the above enactment, word, letter, and point.

The act of January 11, 1812, (sec. 22, 2 Stats., 624,) is identical also with the act of 1799.

The act of July 29, 1813, (sec. 15, 2 Stats., 796,) is the same in all respects.

2. In the Paymaster General's Manual (edition June, 1864,) is the following:

"The laws of March 3, 1799, March 16, 1802, January 11, 1812, and January 29, 1813, give an officer and soldier of the regular army, when honorably discharged, travel, pay, and rations, (or an equivalent in money,) at the rate of twenty miles per day, from the place of discharge to his residence."

3. In the Digest of Opinions of the Second Comptroller (edition 1865, par. 1505, p. 210) is the following:

"An officer, discharged from service at New Orleans, who had been furnished with transportation from the city of Mexico to New Orleans, while on furlough, is entitled to travel-pay home from New Orleans," which is the case at bar precisely, so far as we can judge from the decision. (See also par. 1510, same edition, p. 211.)

4. The War Department, at the beginning of the war of rebellion, issued the following order:

"[General Orders, No. 43.]

"WAR DEPARTMENT,
"ADJUTANT GENERAL'S OFFICE,
"WASHINGTON, *July* 10, 1861.

"Commissioned officers of volunteers received into the service of the United States for two and three years, or for the period of the war, will be entitled to receive one day's pay and subsistence for every twenty miles travel from the place of enrollment to the place of muster into service of the United States, and from the place of discharge to the place of enrollment: the distance to be estimated by the most direct mail route.

"By order:

L. THOMAS,
"*Adjutant General.*

"Official:
"THOMAS M. VINCENT,
"*Assistant Adjutant General.*"

5. By act of July 22, 1861, (sec. 5, 12 Stats., 269,) volunteers were placed on the footing, as to pay and allowances, of similar corps of the regular army.

6. By act of August 6, 1861, (sec. 3, 12 Stats., 326,) general order No. 43, above given, was legalized, together with all orders and the proclamation of the President of May 3, 1861, relating to the organization of the volunteer army.

7. Army Regulations, 1861, (par. 1338, p. 344, and 1863, par. 1369, p. 354,) declare:

"That the traveling pay is due to a discharged officer, unless forfeited by sentence of court-martial or the discharge is by way of punishment for an offense."

ARGUMENT.

This claim rests upon the following:

First. The early acts of Congress cited, giving the travel pay claimed to officers of the regular army, and the act of July 22, 1861, placing volunteers on the same footing with the regular army as to pay, allowances, &c.

Second. The General Order of the War Department, No. 43, of July 10, 1861, and the act of Congress of August 6, 1861, legalizing that order, and upon Army Regulations of 1861 and 1863.

It is urged by the Attorney General—

1. That the uniform construction given the statutes regulating this matter excludes from the benefits of the law officers who are discharged at their own request or upon resignation; and

2. That the travel pay claimed is only payable to officers of the regular army, and is not in any case due to volunteers.

To our position with regard to General Order No. 43, the Attorney General is silent.

Let us examine the foundation of this suit.

First. As to the early acts of Congress:

1. It will be observed that the acts of Congress cited provide "that *whenever* any officer * * shall be discharged from the service, *except by way of punishment for an offense*, he shall be allowed," &c.

A canon of interpretation directs us to look first to the language of the statute to learn its meaning, and if, from the words used, the meaning is obvious, we cannot if we would go beyond that.

Notice, then, first, That the language settles the question of time by the use of a well-understood word, namely, "whenever." Webster defines this word to mean "at whatever time," and he gives no other meaning; nor, ideed, would it seem susceptible of any other. The law, then, means *at whatever time any officer shall be discharged from the service, &c.* Now, if it had been intended to limit this pay to officers who remained in service for a definite period, that period would have been stated; and, if stated, the word "whenever" would not have been used at all, as it would then have been out of place and meaningless.

Notice, second, The use of the word "*any*," which cannot be made more clearly to embrace *all.* If, therefore, the law read "*whenever any* officer shall be discharged from the service, he shall be allowed," &c., no one would doubt for a

moment, on reading it, that *all* officers discharged, *at whatever time*, should be paid the allowance. But,

Notice, third, Congress takes one class of officers out of the operation of the statute, by adding to the words above quoted the following: "except by way of punishment for an offense." No other exception is made.

From a natural reading of the act, is it not true that any officer, whenever discharged and from whatever cause, except by way of punishment for an offense, is entitled to the pay? But for the exception, could any be deprived of it? And does the exception reach any not embraced in it? Look at the language again: "Discharged from the service." This cannot be obscure. To discharge means, according to Webster, "to relieve of an office or employment; to send away from service; to dismiss." Could the law have been written in purer or more unequivocal English?

Look at the exception. Does it in any way control the meaning of the previous language, further than to confine it to those who are not discharged "by way of punishment?"

But, again. Have we not, by the use of the exception, the strongest proof that no others but those discharged by way of punishment were to be deprived of the pay? "*Exceptio unius est exclusio alterius*," is a maxim peculiarly in point here. (Broom's Maxims, London, 1864, p. 626.)

But this plain and manifest reading does no violence to what would seem to have been the purpose of the legislature; allowing, for the moment, that we may conjecture as to that purpose.

The design of the law was to give to the officer the means of returning to his home after he left the service, and the necessity for such provision was not changed, whether he resigned or was discharged on motion of the Government, and against his wish. But Congress might well except those officers who were dismissed for some offense, and this Congress did, but no more. Further, by regulation of the army, officers appointed must join their commands at their own expense. (Army Regulations, 1863, ¶ 1115.) And this provis-

ion only equalizes the expense, by furnishing means of returning, and this expense would be the same to an officer resigning as to any other. Furthermore, this was an inducement to enter the army. Officers were liable to be taken wherever the Government might choose, and as they might be discharged at great distances from home, involving large outlay to return, the law would seem but simple justice.

Perhaps we may as well here, as elsewhere, notice the position of the Attorney General. He says: "Against the allowance of this claim an irresistible argument may be found in the uniform construction given to statutes regulating the matter."

Notice, first, The learned gentleman does not dispute our reading of the statute; he concedes its plain import and meaning, but rests his defense upon usage, or uniform construction or custom.

Notice, second, This plea of usage. We reply:

1. There is no usage and no uniform construction older than the enlistment of this defendant, in 1861. The laws we are now examining related exclusively to regular officers, and they had no stated enlistment, but were officers during good behavior, and only left the army by resignation or by way of punishment for an offense. Hence the law must have contemplated discharges by resignation; and hence, also, there could have been no usuage or custom as to *volunteers.*

2. The decision of the Second Comptroller, quoted by the Attorney General as evidencing the custom or usage, was not made until after this defendant was out of service, and is not to be found in the Digest, edition of 1865. It is new, we think, to make usages retroactive. If statutes can scarcely be so construed, how shall we give such extraordinary effect to so doubtful a thing as custom?

3. The decisions of the Comptroller on this subject, and the only ones prior to March 10, 1865, (date of edition,) of which we have any knowledge, are to be found in paragraphs 1481, 1502, 1503, 1505, and 1510, and no one can read them and be brought to the conclusion reached by the Attorney

General. They do not, in terms nor by implication, show that officers resigning are not entitled to travel pay. The oldest decision there given is one apparently made during the Mexican war, (paragraph 1505,) and reading it one would infer that it was made on the interpretation of the statute we have given.

4. In this edition, (1865,) however, there is one other decision or ruling, which we notice separately, and give entire, (paragraph 1487:)

"As a general rule, an officer who voluntarily quits the service is not entitled to travel pay home; but when his resignation and consequent honorable discharge are in consequence of wounds or disability incurred in the line of duty, it is sometimes allowed as an exception and by special decision."

Here we have the doctrine for the first time hinted, and this decision was given during the rebellion and long after the defendant entered the service. We prove the time of the decision in this wise: Paragraph 1481 gives a decision recorded in vol. 25, p. 499, and cites a law of 1861. The decision we have given above is recorded in vol. 27, p. 447. Again, paragraph 1453 give a decision construing an act of Congress of 1862, and is recorded in vol. 27. This question of time is important, if the court looks at the argument based upon custom. And we find nothing prior to July 17, 1862, that would even put a person on inquiry.

Notice this decision to which we refer. Upon the theory of the Attorney General it is wrong, for the Attorney General makes no exception in favor of officers disabled in the service and compelled to resign. We see, then, the custom he invokes does not sustain him. Indeed, we see there is no certain, uniform, and fixed ruling on the subject laid down prior to the rebellion or prior to the enlistment of this defendant.

5. But we insist that the burden is upon the Government to prove the custom, and not only that, but it must supply certain other proof wholly wanting in the case.

A usage, to be binding, should be definite, uniform, and well known, and it should be established by clear and satis-

factory evidence, so that it may be presumed that the parties had reference to it in making their contract.

Bowling *vs.* Harrison, 6 How., 259.
Oelricks *vs.* Ford, 23 How., 49.
United States *vs.* Buchanan, 8 How., 83.
Adams *vs.* Otterback, 15 How., 539.
Brown *vs.* Jackson, 2 Wash. C. C., 24; 6 Binney, 417; 3 Wash. C. C., 149.
United States *vs.* Duval, Gilpin, 372.

The custom here set up is neither ancient, definite, uniform, nor well known. How can it be plead against an officer enlisting in the interior of Iowa, where the Comptroller's decisions were never heard of prior to the war, and where they will probably never go?

6. But though usage may be employed to construe statutes, it cannot be permitted to defeat the general intent of an act. Lord Mansfield said: "The use of this practice will avail nothing if meant as an evasion of the statute."

Floyer *vs.* Edwards, Cowper, 112.

The case cited by the Attorney General, (United States Bank *vs.* Halstead, 10 Wheaton, 62, 63,) does not change the principles we have stated. The presumption that Congress knew and legislated with reference to the construction set up by the Attorney General cannot by possibility be admitted. There was no construction known to any one, much less to Congress. A cursory reading of the case cited will show how wide it is of this case.

So also of the other cases cited. They in nowise change or modify the rule we have given. Before they can be invoked, the Government must show the usage, its antiquity, its definiteness, and that it was known. This has not been done and cannot be done.

7. But this resort to usage is only to aid the court where there is obscurity or room for construction. In the case here the law is plain. In the language of Lord Tenterden, in The King *vs.* The Inhabitants of Great Bently, (10 Barn.

& Cres., 520, 526,) "We think it much the safer course to adhere to the words of the statute, construed in their ordinary import, than to enter into an inquiry as to the supposed intention of the persons who framed it."

8. Again, it is not true that Lieutenant Price quitted the service upon his own motion and by his own act.

The Government always reserves the right to grant the request or refuse it, and the officer is powerless to control its action.

"No officer will be considered out of the service on the tender of his resignation, until it shall have been duly accepted by the proper authority." (Army Regulations 1863, Art. V, sec. 24.)

If he quit his post prior to due notice of the acceptance of his resignation, he shall be registered and punished as a deserter. (*Ibid.*)

If his application be refused, he must remain in the service or be branded a deserter. (See also ¶ 1647, Digest Judge Advocate General, 1868, p. 328.)

It is then the action of the Government, and not of the officer, that severs the relation, and there can be no difference, so far as the discharge or dismissal from service is concerned, whether it is solicited by the officer or done without his solicitation. The deciding and controlling mind is not the officer's. If the fact that the officer was willing to leave the service, or left voluntarily, should govern, there were few cases in which the Government would have paid travel allowance; whereas it was paid in all cases at the close of the war, and denied only during the war to officers resigning. The officers who resigned, most of them on account of wounds received in battle and disability incurred, uniformly claimed this allowance, and, as we have seen by decision of Comptroller, in some instances obtained it. It is not true that officers acquiesced in the decision and this claimant sought remedy through the courts.

9. The Attorney General suggests not only the construction as against this allowance, but asserts that this construc-

tion has been adopted by subsequent re-enactments of the provision construed.

This might raise some doubt, if true; but the record shows no such fact, and cannot be made to. The court cannot presume the fact to be as claimed by the Government. It would, on the contrary, be more reasonable to presume, that if Congress intended to add to the exceptions named in the law, it would have so provided in subsequent enactments, whether the construction were known or not.

10. The Attorney General adds a further objection. The defendant had the misfortune to be a volunteer officer, and the Attorney General says: "In favor of volunteer officers there is in the statutes no direct allowance of travel pay." We think this a mistake. By virtue of the 5th section of the act of July 22, 1861, officers were placed on the same footing as to pay allowances, &c., as regular officers. It was by this provision only the army officers were paid throughout the rebellion. They looked to the law governing the regular army as much as if its provisions had been re-enacted. Indeed, this section 5 of the act of July 22, 1861, does re-enact the law of the regular army.

11. The learned counsel for the Government says: "The footing thus referred to must have been that established and known since 1799." True, but that footing is plainly defined in the statute, and nothing contradicts our reading of it in the form of contemporaneous construction, usage, or custom, departmental ruling, or aught else of an older date than since this defendant entered the service. How, then, can there be doubt?

12. It is added also that our view carries with it the rights of soldiers as well as officers. Suppose this to be true. Is justice too pure a thing to be shared by our soldiery? Is the "one remove," referred to as the status of volunteers, compared with the regular army, the "remove" which shuts them out from the temple they saved?

If the Attorney General had reflected, he would have seen that soldiers do not resign or quit the service at their own request; and if he had looked further into the acts of Con-

gress, he would have found special provision made for them. (Act July 21, 1861, sec. 5, 12 Stats., 270.)

Second. As to the general order No. 43.

1. But the claim of this officer rests not only upon early statutes extended to him by the act of July 22, 1861; it rests also on a distinct promise, conveyed in the general order we have quoted. That order was one of a series, emanating from the War Department pursuant to the President's proclamation of May 3, 1861.

It will observed, upon reading the order, that the only exception mentioned in the early statutes is omitted, and the travel-pay is promised without restriction to officers of volunteers received into the service of the United States upon discharge therefrom.

This is a distinct promise to volunteers, and had direct reference to the volunteer army then being organized; and while it is based upon the principle underlying the early statutes, it enters into the contract made with volunteers without reference to those statutes.

We claim that the President, in issuing this order through the War Department, had a right to promise this travel-pay, there being then, July 10, 1861, no statute extending the provisions of the early acts to volunteers.

Gratiot *vs.* United States, 4 How., 80.
United States *vs.* Eliason, 16 Pet., 291.
The United States *vs.* Duval, Gilp., 357.

But if the President had no right to promise this allowance, we claim that the promise was made binding by act of Congress of August 6, 1861, (sec. 3, 12 Stats., 326.)

This last proposition was decided by this court in Hosmer's case. (9 Wall., 432.)

That case not only decides that the proclamation of the President and orders of the War Department relating to the organization and pay of the army were validated and ratified, but it goes far to establish the right for which we contend.

In Hosmer's case, he, in common with other soldiers, was

promised, by general order of May 4, 1861, when discharged, the bounty of $100.

By the act of July 22, 1861, two years' service were made requisite to obtaining the bounty of $100. But the act of August 6, 1861, legalized the order of May 4, and this court held that the act of July 22, 1861, did not limit the promise made May 4, 1861, and ratified August 6, 1861.

To say the least, there was expressed by Congress in the act of July 22, 1861, a principle, making two years requisite in obtaining bounty; yet this court was not disturbed by that intervening statute, and it gave to Hosmer the bounty, although he had served but six months.

In the case at bar, between the order No. 43, of July 10, 1861, and the act of August 6, 1861, there is no intervening statute, not even an intervening adverse departmental construction. The earlier acts we have cited cannot be invoked, for they relate to the regular army, and were not extended to volunteers until July 22, 1861. And, even if these earlier acts are made to intervene, they only serve to add legislative sanction to the promise held out in General Order 43, afterwards ratified.

It will be seen, then, that the utmost stretch of power could only interpose a *usage* with reference to statutes relating to the *regular army*, in order to control a distinct promise made to the *volunteer army*, which we think would be wholly unwarrantable in any case, and especially so in this, where no usage is established.

2. Again, we have the Army Regulations, (¶ 1338, p. 344,) published for the government of both armies in 1861, promising this travel pay to all officers when discharged, with but one exception, to wit, when discharged as punishment for an offense, and these regulations are binding upon the Government, (so held by the court in many cases, 16 Peters, 29,) not only upon general principle, but made so by act of Congress, and the same promise is reiterated in the Revised Regulations of 1863, (¶ 1369, p. 354,) with no other exception than that already named. (See note p. 56, Digest Judge Advocate General, ed. 1868, as to authority of Regulations.)

It would seem, therefore, in view of all this authority for doing what is manifestly but an act of justice to the officer, there should be no difficulty in the case.

3. To make the case more perspicuous, substitute A B for the Government: The claimant agrees to work for A B for a certain salary per month, and for the term of three years, unless sooner discharged, and is promised that, when discharged, he shall receive a stipulated amount as travel pay home. Can A B avoid this promise if, upon claimant's request, he discharges him before the three years expire? Certainly not, except by express condition the claimant waives this travel pay. A B could have held on to him; he chose, however, to discharge him, and he must complete the payments he originally promised. In this case no time of service is mentioned, and so far as is shown defendant served his full term.

A hires B to make a voyage from New York city to California and China, unless A should release him sooner, and whenever discharged, except "by way of punisnment for an offense," to pay B travel allowance back to New York from place of discharge. In California B asks to be discharged. A has the power to release him or not; he releases him without making any stipulation about the travel allowance. Cannot B compel payment of this allowance? Was it not as much a part of the contract as that promising salary?

But it is hardly possible to make this plainer than the law makes it. It is clear and unmistakable, and can bear but one construction. It would have been a simple thing to have excluded resigned officers from its benefits, but this was not done, and was never intended to be done, and to interpolate a provision now would not only be beyond the province of judicial interpretation, but would be grossly unjust to this claimant.

CONSTRUCTION OF STATUTES.

We hardly feel warranted in this case to discuss principles or rules of construction.

1. This court has repeated many times the rule laid down

in Fisher *vs.* Blight (2 Cranch, 358:) "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed."

This rule is universally acted upon, and is the same, whether we are considering an agreement between parties, a statute, or a constitution; the thing which we are to seek being *the thought which it expresses;* that which the words declare is the meaning of the instrument; and the courts have not the right to add to, or take from, that meaning. (Newell *vs.* the People, 3 Selden, 97.) In a brief analysis of the statutes we have shown the plain, natural import of the language used, and we think it will be seen that there is no room for construction.

2. The theory advanced by the Attorney General involves the necessity of importing into the statutes words which are not to be found there. He requires the court not only to say, as the statute does, that whenever an officer is discharged, except by way of punishment for an offense, he shall be paid, &c., but he requires the court to add the words, "except also by reason of resignation tendered, or at his own request." In such case, says Lord Denman (Lamond *vs.* Eiffe, 3 Q. B., 910,) "we are required to add some arbitrary words to the section. We cannot introduce any such qualification, and I cannot help thinking that the introduction of qualifying words in the interpretation of statutes is frequently a great reproach to the law."

And Chief Justice Tyndall says, in Everett *vs.* Wells, (2 Scott N. C., 531,) "It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing."

It must be perceived that, unlessthese wise and beneficent rules of law are observed, there is no limit to the inroads that may be made upon the statutes. If you import into the statute the arbitrary words suggested by the Attorney General, may you not also add others, and thus destroy the law.

3. The Attorney General invokes the maxim of the civil

law: *Contemporanea expositio est fortissima in lege.* To this we say, the maxim is to be used only where the statute is obscure or doubtful, and it is then used, as Lord Coke says, because the construction is supposed to have been given by the sages of the law, who lived about the time or soon after it was made. In this case no such contemporaneous exposition is shown. Nor do we find any legislative exposition, nor judicial construction, nor usage, which will authorize a departure from the plain letter of the law. There would seem, therefore, nothing left to be done but to enforce the statute according to its manifest intent.

4. Furthermore we say, that, in the construction of statutes fixing the compensation of public officers, the rule of interpretation, as held by the courts, is, that where words obscure admit of two meanings, they should be construed in favor of the officer. (The United States *vs.* Morse, (3 Story, 87.) So that, if there is doubt, it should be resolved in favor of the officer.

5. The Attorney General concludes his brief by suggesting, that to sustain the defendant's suit would drain the treasury of millions not only for the benefit of officers, but of soldiers. We have already shown, so far as the soldiers are concerned, they were provided for and paid; and it is also shown that only officers who tendered their resignations have any claim.

But is there any merit in this *ad hominem*, or, more properly speaking, *ad captandum vulgus*, argument?

Is this the requited faith of the Republic? Is this the plea by which the obligations of the Government are to be wiped out? Then burn your national bonds; repeal your bounty statutes; destroy your pension rolls; lock up in your vaults the millions of dollars, proceeds of captured and abandoned property, and let us start under a new era, which has for its motto: Universal repudiation!

But perhaps we have mistaken the precise import of this plea; at best it is but an argument *ab inconvenienti.* It is doubtless inconvenient for the Government to pay anything out of its Treasury; it is so usually with all debtors. "The

only sound principle, however, 'as Mr. Justice Story says,' is to declare *ita lex scripta est*, to follow and to obey." (McIver *vs.* Ragan, 2 Wheat., 25.)

This suit stands as though it were between two individuals. What would be thought of a plaintiff who should suggest to a court that he trusted the defendant would be beaten because of the drain otherwise made on his bank account!

As to the truth of the plea, in point of fact, we know not; we have but one client, and he is here with his case because he had no other remedy. We do not believe, however, that there can possibly be any such sum involved as the Attorney General suggests, and whatever sum there may be, it is precisely what it would have been if the officers had waited to go out of service on the motion of the Government; or if the Government had chosen to compel them to remain in service, as it had the power to do; unless, it may be, that the officers had died in service, and thus the Government would have escaped the payment of the debt. This leads us to remark, by way of consolation to our timid Treasury, (a sad one though it is,) that for every officer who resigned and claims this travel pay, two were killed in battle or died in service whose heirs have never received and are not entitled to this travel pay: so that the Treasury ought not to complain. And this leads us further to remark, that nine of every ten officers who resigned, quitted the service, as this defendant did, from disease contracted in Government service, or from wounds or loss of limbs. How can it be that Congress never intended to provide for returning these patriots to their homes? How can it be that the courts, or public sentiment, or Congress itself, would justify the repudiation of this as clear a debt as the Government ever contracted?

In the just and patriotic language of this court, expressed by Mr. Justice Swayne in the Hosmer case, "We may add, that it would not comport with the dignity of the Government thus to break faith with the gallant men who in that hour of gloom stood forth to imperil their lives for their country."

CHIPMAN & HOSMER,
Attorneys for Defendant.

SUPREME COURT OF THE UNITED STATES.

No. 245.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANTS, vs. JOSEPH W. PRICE.

Supplemental brief for the United States.

Under the order of the court for a reargument of this case, the Attorney General submits this supplemental brief.

In relation to the practical construction given by the accounting officers of the Government to the statute under which this claim has arisen, and to like earlier statutes, namely, those of 1813, 1802, and 1799, information has been furnished by various bureaus of the Treasury and War Departments charged with the administration of those enactments. The communications from those bureaus are herewith submitted, namely: from the Second Comptroller of the Treasury; Adjutant General of the Army; Paymaster General; Second and Third Auditors.

These communications show conclusively that the refusal of travel pay to this appellee is in conformity with the practice of the War Department and of the accounting officers of the Treasury, in the war of the late rebellion of 1861, in that with Mexico of 1846, and in that of 1812 with Great Britain.

Instances of payment of such allowances in isolated cases will not serve to contradict these communications; especially, will not mere payment of the item in dispute by a paymaster; for a paymaster makes payments at his own discretion, subsequently accounting for the money placed in his hands, under responsibility secured by bond. It is therefore necessary to show not merely payment of this item, but a subsequent allowance of the payment to the paymaster who made the same.

These communications show further the ground upon which this practice has rested, and which gives thereto the authority of law; that is, the following:

An acceptance of a resignation is not, in the military service of the United States, known as a discharge. A discharge is known to the law—to the statutes under which this claim is made—as a mode of leaving the military service open alike to the commissioned officer and the enlisted man, whereas an enlisted man cannot resign, this privilege being open to commissioned officers alone. (See communications from Paymaster General, Adjutant General, and Second Comptroller.)

This view is held to apply even to the acceptance of resignations based upon surgeons' certificates of disability, caused by wounds or sickness incurred in service: officers thus resigning not being deemed

by the War Department entitled, as of right, to travel pay, and being allowed the same by the accounting officers of the Treasury, on considerations which seem to address themselves to the discretion of those officers.

It is further to be noticed that as to volunteers, officers or soldiers, the uniform understanding of the Government has been that for the full term of service, (for instance during the war,) there is to be travel pay only at its commencement, and again at its close. The regiment is transported to and from the seat of war at the expense of the Government. But the officer appointed during the term from civil life joins his command at his own expense; and the travel of the officer returning home during the term is governed by the same rule.

The estimates for appropriations for the Army are made upon this understanding.

The following consideration also seems appropriate to this brief.

The learned counsel for the appellee objects to the allowance, as of authority in the interpretation of the statutes under consideration, of this practice of the Government, *because this practice*, as he urges, *was not known to officers entering the military service from civil life in parts of the country far distant, in some cases, from the seat of Government, where this practice had originated.*

It seems a sufficient answer to this objection to suggest that volunteer officers and soldiers entering the service for a limited period (comparatively brief) intended to complete their full term of service *unless sooner "discharged by reason of death" or wounds incurred in service.* They did not contemplate voluntary resignation during that term, and took no note of any minor conditions of such resignation.

There is also added here the following extract from the opinion given by the Court of Claims in this case, as tending to make clear a point upon which some doubt has been suggested in this court, namely, whether this is a case of physical disability *incurred in the service:*

"The case was argued some time since, and submitted for judgment, but was remanded to the docket because the final discharge of claimant, and the order under which it was issued, was not otherwise in proof than by his own testimony, which was considered insufficient; the return of the War Department, then on the record, not showing that claimant was honorably discharged, or that the disability mentioned was incurred in the line of his duty.

"By a second return from the War Department, recently placed on the record, it is shown that the claimant was honorably discharged the service, his discharge having been granted on a surgeon's certificate of disability, but it does not appear that the disability arose by anything that occurred in the line of his duty." (4 C. of C., 170.)

Between disability incurred in the military service and disability incurred otherwise, the Attorney General will remark that the distinction made by all parts of the Government which have to do with military service is of the broadest character, yet not capable, as has been observed elsewhere, of giving to the acceptance of a resignation of the most meritorious class the effect in law of a discharge.

In response to the second branch of the order, is herewith furnished a computation prepared in the office of the Paymaster General, showing the method in which travel pay (if any) should be allowed to this appellee. The judgment given this appellee was doubtless intended to be computed upon this basis. An error occurred from taking the price of the ration at the rate fixed by the act of March 3, 1865, namely, fifty cents, instead of the previous rate of thirty cents. It is to be noticed, that only the officer's own (and not his servant's) rations are allowed.

A. T. AKERMAN,
Attorney General.

REPORTS FROM SECOND COMPTROLLER, SECOND AUDITOR, THIRD AUDITOR, AND PAYMASTER GENERAL.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
Jan'y 5th, 1871.

Hon. THO'S H. TALBOT, *Ass't Att'y General.*

DEAR SIR: Referring to our conversations on the subject of travel-pay to resigned officers, I will bring a few points to your attention.

When the Second Comptroller's Office was established in 1817, the practice of disallowing travel-pay to officers who resigned had been long adopted, and of course no decision of the office was required.

The earliest decision I have found in writing construing the law of July 29, 1813, and the prior laws in the same words, was made on the 13th of January, 1819, and occurred in the settlement of the Paymaster General's accounts for the year 1816. It was made by the Third Auditor, sanctioned by the Second Comptroller, and was in these words: "$18 67. Disallowed payment to (the Hon. Ballard Smith, for) Abraham Longacre, ensign 6th reg't Virginia militia, for 15 days travelling allowance. Having voluntarily retired from the service by resignation, is not entitled to it by law."

The Adjutant General of the Army has no written decision on the subject, but says the denial of travel-pay to resigned officers is of immemorial usage.

The construction and usage were as well known as the laws, for more than half a century, and the officer tendering his resignation must be presumed to have known the condition on which it would be accepted. *Non constat* that the Government would have released him from service if it would be liable for travel pay. In fact it is almost certain that acceptance of a resignation would have been frequently refused, if the United States had been adjudged responsible for any such expenditure. The process might be repeated by the successor of the officer, and the Government might pay much more for travel than for service.

Even if the decision under the laws of 1799, 1802, 1812, and 1813 were of doubtful correctness, still that decision was universally known. If the officer got for his services what both he and the Government understood he was to get when he entered, is not that enough, and is not the legal obligation of the Government discharged? Accounts almost innumerable, many settled for half a century, and which both the officer and the Government thought at the time were rightfully settled, would be reopened by a reversal of the construction, in order to make an additional allowance. Mere inconvenience is no controlling reason against the enforcement of a plain law, but when there is doubt, it may fairly assist in the formation of an opinion. The officers who resigned to enter the rebellion were not discharged by way of punishment for an offence, but shall the U. States be held to pay their travelling, expenses home to fight against the Government? They did not so understand it. All officers resigning knew that they tendered their resignations and the Government accepted them on the condition established by an ancient and uniform construction.

All the laws cited used a term common to both officers and men—"*discharge.*" An officer's connection with the service may be severed

in three modes: By resignation; by honorable *discharge* at the option of the Government; and by dismissal. The soldier cannot resign. He goes out by discharge only. The selection and reiteration of the word in the several laws is a pregnant fact. The acceptance of a resignation is not a discharge within the meaning of the law. The officer asks to be released, and the Government assents. When the Government, *of its own motion*, discharges bodies of troops, or individual officers and men, then travel-pay is allowable and allowed under the law. You have doubtless noticed that the laws from 1799 to 1813 show that *bodies of troops* were to be raised, to be disbanded when the emergency was over, with a promise to return them home on discharge, or give them travel-pay, as an inducement for them to enlist.

I send copies of two decisions of this office duly certified.

I have stated, very hurriedly, what occurs to me on the subject. I will only add that public policy must be opposed to reopening accounts settled for much more than half a century.

Very respectfully yours,

J. M. BRODHEAD,
Comptroller.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
July 8th, 1864.

SIR: The certificate and accompanying papers in the case of Richard H. Weevil, brig. sur. U. S. V., who resigned at Nashville, Tenn., [claiming travel pay,] to Phila., Pa., the place from whence he was appointed, are herewith returned without my approval.

The general principle of allowing travel-pay and subsistence to officers and soldiers who are discharged the service, should not apply to cases of this kind, where an officer leaves the service by resignation.

Officers are not supposed to resign their commissions in the military service except to secure their own personal and private interests; and the Government in releasing them from service at their own request should not be required to pay large sums of money in the way of travel allowance. Officers appointed from civil life are required by regulation to join their commands or stations without expense to the Government; and when the officers withdraw from the military service by resignation, I see no reason why they should not be placed on the same footing as to travel pay as when entering said service.

If the principle of allowing travel-pay to resigned officers should be adopted as a rule, the officer, selecting his own time and place of resignation, might put the Government to an expense enormously disproportioned to the value of the services he may have rendered.

An officer, for instance, is appointed from Maine, is sent to Texas, and, resigning there in a short time, would receive an amount for travel equal to his pay for nearly half a year.

Very respectfully,

[SEAL.] J. M. BRODHEAD,
Comptroller.

Hon. E. B. FRENCH, *2d Auditor.*

A true copy. Witness my hand and seal of office.

J. M. BRODHEAD,
Comptroller.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
April 28th, 1855.

P. CLAYTON, Esq., *Second Auditor.*

SIR: The principle in the case of *Bridges* submitted by you, presenting the question of a right to mileage, &c., to soldiers discharged at their own request before the expiration of their terms of enlistment, was substantially decided by Comptroller Thornton on the 7th of April, 1832, in a letter to the Paymaster General, of which a copy was sent to the Second Auditor.

In that letter he said: "I am of opinion that soldiers so discharged from the Army are not entitled to travelling pay or rations from the place of discharge to their place of residence, because such discharges are never granted but at the request of the soldier, *and for his own pleasure and convenience.*"

The soldier, under such circumstances, asks and obtains a release from his contract of enlistment, and the other party, the U. States, in assenting, must be held to be released from any correlative obligation to him.

If a soldier who is discharged at his own request, not in consequence of sickness but for his own convenience, can receive travelling pay to his residence, the process might be repeated with a recruit enlisted in his place, and so on, to the pecuniary detriment of the U. States. Such a policy is not legal or equitable, and cannot be sanctioned.

The retained pay can be paid up to the period of an honorable discharge at any time, as that has been earned by the soldier.

In the particular case of Bridges the documents from the Adjutant General's Office, which I send herewith, show that he was certainly discharged under circumstances that would forbid any allowance of travelling pay.

The paper referred by you is herewith returned.

I am, sir, your ob't serv't,

[SEAL.] J. M. BRODHEAD.

A true copy. Witness my hand and seal of office.

J. M. BRODHEAD.
Comptroller.

TREASURY DEPARTMENT,
SECOND AUDITOR'S OFFICE,
Washington, January 3, 1871.

SIR: In compliance with your request of the 22d ult., asking for information regarding the practice of the Government from the earliest date as to the allowance of travel pay to officers leaving the military service at their own request, &c., I herewith transmit certified copies of a portion of the records of this office in several cases.

The records pertaining to claims arising from the war of 1812 are in the custody of the Third Auditor of the Treasury, whose office was charged with the adjudication of the claims; but during and since the Mexican war the practice of the Government has been uniform upon this question, and as indicated by the papers herewith submitted.

E. B. FRENCH, *Auditor.*

T. H. TALBOT, Esq.,
Assistant Attorney General U. S.

TREASURY DEPARTMENT,
SECOND AUDITOR'S OFFICE,
January 3, 1871.

I hereby certify that it appears from the records of this office, of which I am the legal custodian, that the papers hereto attached are correct copies of the original papers on file in this office.

E. B. FRENCH,
Second Auditor U. S. Treasury.

Be it known that E. B. French, who certified the foregoing, is now, and was at the time of so doing, Second Auditor of the Treasury of the United States, and the legal custodian of the records of the Second Auditor's Office, and full faith and credit are due his official attestations.

In testimony whereof I, Geo. S. Boutwell, Secretary of the Treasury of the United States, have hereunto set my hand and caused to be affixed the seal of the Treasury Department, at the city of Washington, in the District of Columbia, this third day of January, in the year A D. 1871.

[SEAL.]

GEO. S. BOUTWELL,
Secretary of the Treasury.

TREASURY DEPARTMENT,
SECOND COMPT'S OFFICE,
Nov. 20th, 1851.

P. CLAYTON, Esq., *Second Auditor.*

SIR: The papers connected with the claim of Lt. Tully, late of the 1st reg't Ill. vols., for three months' extra pay, referred to me by your letter of the 14th inst., are herewith returned.

It appears that Lt. T. resigned his commission (no cause being stated therefor) on the 15th of August, 1848. His reg't was not discharged until the 18th of October, 1848. The allowance is now claimed upon two grounds—

1st. That though he resigned before his reg't was discharged, the war had previously terminated.

2nd. That his resignation was on account of ill health and consequent inability.

As to the first ground it is sufficient to say that, though the period of enlistment of these regiments was made by law to be "during the war," this has always been held to extend to the time of regular discharge of the reg't from the service at the close of the war; any other construction would occasion great confusion.

As to the second, even if evidence is now to be admitted to show that a resignation was on account of ill health, when that reason was not assigned at the time, and is not shown by the records, (of which the propriety is at least very questionable,) the evidence, in this case, does not show that the ill health, referred to by the surgeon in his affidavit, was "incurred while in the service of the United States." This, under the printed decision of the Sec'y of War of Aug. 3d, 1848, is indispensable to entitle the claimant to allowance where discharged before the expiration of his term.

I am of opinion, therefore, that Lt. Tully is not entitled to the three months' extra pay.

I am, sir, very respect., &c.,

E. J. PHELPS, *Compt.*

(Indorsed:) Lt. Murray F. Tully, Ill. vols. 2nd Comptroller's opinion rejecting claim for 3 months' extra pay. November 20, '51.

TREASURY DEPARTMENT,
SECOND AUDITOR'S OFFICE,
April 9, 1852.

SIR: In the case of Lt. M. F. Tully, Co. F, 1st Illinois vols., I make the following report: Lt. Tully, who resigned at Santa Fé, Aug. 14th, '48, claims three mos. extra pay, under act July 19th, '48, and travel pay from place of resignation home.

His claim for extra pay was allowed by this office, on the evidence presented, (which see,) but disallowed by the Second Comptroller, for reasons stated in his letter herewith of November 20th, '51.

His claim for travel-pay was not allowed by this office, for the reason that neither the rolls in this, or the record in the Adjutant General's Office, show that he resigned for cause; the Second Comptroller having decided that officers voluntarily leaving the service by resignation were not entitled to travelling allowance.

The respective claims, together with all the evidence, are herewith respectfully submitted for your action.

Very respectfully your obedient servant,

P. CLAYTON,
Second Auditor.

Hon. C. M. CONRAD,
Sec'y of War.

This was an appeal case to the Secretary of War, and on the 31st day of May, 1852, the papers were returned to this office, with the following indorsement: "I see no sufficient grounds for making any change in the rolls. (Signed) C. M. Conrad, Sec'y of War."

E. B. FRENCH, *Auditor.*

C. B. G. 62.

HEADQ'RS 10 MIL'Y DEP'T,
Monterey, California, June 19, 1847.

Order No. 27.

2d Lieut. John S. Day, of the 7th reg't New York volunteers, having sent his commission to the colonel commanding the department, with an expression of his wish to retire from the service, is hereby honorably discharged from the service of the U. S., the discharge to take effect on the last day of the present month.

By order of Col. R. B. Mason.

(Signed) W. T. SHERMAN,
1st Lt., 3d A. A. A. Gen.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
May 27, 1851.

P. CLAYTON, Esq., *2d Auditor:*

SIR: The certificate of allowance of a claim of Lt. John S. Day, of Col. Stevenson's reg't of New York vol's for travelling pay and emoluments, from San Francisco to Buffalo, together with all the papers in the case, is herewith returned without my approval.

The military order under which Lt. Day left the service states that, "having sent his commission to the col. commanding the department, with an expression of his desire to retire from the service, is hereby honorably discharged from the service of the United States."

By the uniform construction of the act of January 29, 1813, from the date of its passage to the present time, officers voluntarily leaving the service by resignation have been excluded from the benefit of the travelling allowance. Lt. Day, having thus voluntarily left the service, is clearly not entitled to the benefit of that provision.

HILAND HALL,
Comptroller.

TREASURY DEPARTMENT,
Jan. 3d, 1871.

I hereby certify that the foregoing is a true copy of a portion of the records of this office in case of Lieut. John S. Day.

E. B. FRENCH, *Auditor.*

Second Auditor

NOVEMBER 28, 1851.

WASHINGTON GIBBON, Esq., *Rochester, New York,*
(Care of N. Quackenbush, Esq., Indian Office, present.)

SIR: The "3 mos. extra pay" claimed of Joshua B. Davis, Capt. Hungerford's co., Barnett's New York vols., cannot be allowed, as the Secretary of War has decided that "where the soldier has been discharged on his own application on any grounds which did not render him incapable of serving out the term of his engagement, he is not entitled to the benefit of the extra-pay law of July 19, '48, although an honorable discharge may have been given him." Mr. Davis was discharged on his own application, not on account of sickness or disability of himself, but on account of distress in his family, brings him under the decision of the Secretary of War above referred to.

(Signed) P. CLAYTON.

R. W. M.

TREASURY DEPARTMENT,
SECOND AUDITOR'S OFFICE,
Jan. 3d, 1871.

I hereby certify that the foregoing is a true copy of the original letter of rejection of the claim of Capt. Joshua B. Davis.

E. B. FRENCH, *Auditor.*

NOV. 18TH, 1851.

Mr. HENRY ROBINSON,
(Care of Mr. R. H. Stone, Cincinnati, Ohio.)

SIR: Having voluntarily left the service you are not entitled to either travel or extra pay.

This information has been imparted to your agents, Mr. Easton, Mr. Minette, and Messrs. Edwards & Smith, both by this office and the pay department.

(Signed) P. CLAYTON.
R. W. M.

SECOND AUDITOR'S OFFICE,
January 3, 1871.

I hereby certify that the foregoing is a true copy of the original letter in case of Henry Robinson, regarding his claim for extra pay and traveling allowances.

E. B. FRENCH, *Auditor.*

TREASURY DEPARTMENT,
SECOND AUDITOR'S OFFICE,
May 14, 1869.

SIR: The claim made by you as late lieut. of co. B, 6th reg't Ohio cavalry vol's, for pay and travel allowances, from Fort Larimie, the place of your discharge, by resignation, to the place of your residence in Ohio, is disallowed, such allowances never being paid in the case of a resigning officer.

Very respectfully,

E. B. FRENCH, *Auditor,*
By C. H. M.

Mr. CARMAN VAN ANDA,
Georgetown, Ohio.

SECOND AUDITOR'S OFFICE,
January 3, 1871.

I hereby certify that the foregoing is a true copy of the letter of rejection of the claim of Lieut. Carman Van Anda for travelling allowances.

E. B. FRENCH, *Auditor.*

[Form A, 16.]

TREASURY DEPARTMENT,
SECOND AUDITOR'S OFFICE,
Dec. 6th, 1867.

SIR: The application in the case of Lt. Col. Horatio Bisbee, jr., 9th Me. vols., discharged March 19, 1860, is rejected.

Claimant was not mustered as col. for the time claimed, as appears from his muster-out roll herewith returned.

Also, he was discharged by reason of tender of resignation. He is not entitled, therefore, to pay as col., nor for transportation.

Respectfully, yours,

E. B. FRENCH, *Auditor.*

Messrs. CHIPMAN, HOSMER & CO.,
Washington, D. C.

C. B. S.

SECOND AUDITOR'S OFFICE,
January 3, 1871.

I hereby certify that the foregoing is a true copy of a portion of the records in case of Lt. Col. Horatio Bisbee, 9th reg't Maine vol's.

E. B. FRENCH, *Auditor.*

WAR DEPARTMENT,
Washington City, January 3, 1871.

To the honorable the ATTORNEY GENERAL:

SIR: In compliance with your request of the 22nd ultimo, for information to be used in the case of The United States, appellants, vs. Joseph W. Price, now pending in the Supreme Court, I send, herewith, a communication of the 3d instant, with a report dated December 31st, 1870, from the Paymaster General of the Army on the subject.

Very respectfully, your obedient servant,

WM. W. BELKNAP,
Secretary of War.

Report.

PAYMASTER GENERAL'S OFFICE,
WAR DEPARTMENT,
Washington, December 31st, 1870.

In conformity with the suggestions of the Attorney General's letter of the 22nd inst., herewith, I am called upon to state the practice of this Department as derived from the constructions and controlled by the rulings of the proper law officers of the Treasury and the War Department.

From the earliest period of which the public records show anything on the subject, it has been the unvaried practice to deny travelling allowances, (one day's pay, &c., for every 20 miles travel to their homes,) to officers leaving the military service, on acceptance of their resignations, voluntarily tendered.

I can assert, from assured personal knowledge, that this practice has been a fixed and settled one during the twenty years and more that I have served as paymaster and Paymaster General of the Army.

That the doctrine and the rule of the accounting officers of the Treasury was the same fifty-five years ago, is shown by an extract from the records of this office relating to a transaction directly in point, which occurred in 1816, being a certified letter addressed to the Hon. Ballard

Smith, a member of Congress from Virginia, hereto appended. In this it will be seen that the 3rd Auditor of the Treasury had stopped against the accounts of the Paymaster General for that year, (1816,) an amount paid as "travelling allowances" by his authority, to Ensign Abram Longacre, of the 6th regiment Virginia militia, in these words: "Having voluntarily retired from the service, *by resignation*, is not entitled to it, (travelling allowance,) by law."

Indeed, of such long duration and unvarying uniformity has been the practice of the Government in this behalf, and so complete the acquiescence in it of all concerned, that the records fail to show any cases to the contrary, or cases wherein the principle has been contested or controverted.

In the examination of the laws, and the just construction thereof, there would seem to be no want of provision, explicit or plainly implied, for the payment of travelling allowances to officers and men of all branches of the service after honorable discharge at the expiration of their terms, or before such expiration, when discharged for sickness or wounds incident to service, or when discharged because the Government no longer required or needed their services. But nowhere is there found authority, express or by fair implication, to give such allowances when the severance from the service is the voluntary act of the officer, on his own tender, and for his own purposes.

The resignation of an officer is in its very nature the voluntary relinquishment of office, its incumbent duties, and obligations. It is in our service an avenue not usually closed against him, but very generally available when he chooses to resort to it. For there has always been in our Government a well-grounded disinclination to refuse an officer's application to resign from a service which is no longer agreeable to him, or for which he is unsuited. Indeed the liberality of the Government in this particular has been often, very often, extended to cases of questionable justification; as where an officer charged with delinquency or crime resorts to the easy alternative of resignation, without comment, to save himself from trial and dismissal with disgrace.

It has always been the holding and practice that, as relates to travelling allowances, the laws are equally applicable to all classes of troops, volunteers and militia, when in the U. S. service as regulars.

But when an officer becomes disabled through sickness or wounds, he is bountifully and tenderly provided for by the medical staff of the Army. Should his injuries be of but temporary character, he is healed and restored to duty; but if they are in the nature of permanent disqualification, the medical officer in charge, at the proper time, certifies the fact to the proper authorities, and upon that certificate the disabled officer receives an honorable discharge, with all the benefits of our liberal laws in such cases provided. This is the *modus operandi* of immemorial usage.

With these facts in the knowledge of every officer, it is inconceivable that one really disabled in honorable service would forego the benefits and advantages of the ordinary form of discharge for disability by resorting to a tender of resignation.

Such a thing as "*resignation on surgeon's certificate of disability*" may have been an irregular occurrence at some time, but I am sure in all my army experience I never before heard of one. It is a solecism in military practice.

If the tender and acceptance of a resignation in all cases constitutes such honorable discharge as counsel urge entitles to travelling allow-

ances, what becomes of the hundreds of cases of resignations accepted at the beginning of the late rebellion, that the retiring officers might give their strength and ability to the treasonable service of the insurgents? Those discharges were not "by way of punishment," and therefore, by the logic of counsel, claim may be maintained in their cases for travelling allowances, under the law of March 3, 1799. Now, if the federal authorities had not felt impregnable in their long-continued construction and practice, they would not have given such ready acceptance to resignations of that character. A liberal and magnanimous President, though willing to let those "wayward" officers "depart in peace," I am quite sure did not design to pay them for going.

Let it not be overlooked that, though there are unquestionably resignations for meritorious cause, commendable to the officers tendering them, yet there are not a few of quite a different character. Beside many under this latter head, to which I have already adverted, there are others, those who long for the safety and comfort of a quiet home, and do not nerve themselves to brave the hardships and dangers of an active campaign when they are compelled to face its realities. I have even heard of instances where sheer cowardice was believed to be the impelling motive.

The salutary practice of the Government, which I have asserted, does not hold out a premium to such unworthy shirkers of duty. It at least has the merit of saving the Government, in some small measure, from egregious imposition in these cases.

I may add for what it is worth my conviction that, if the practice in question be reversed, by a decision in this case of the court of last resort, language could hardly exaggerate the magnitude of the evils that will inevitably flow from it, in giving rise to dormant claims never dreamed, now or heretofore, by the real parties in interest as having an existence, amounting to millions of dollars, and extending back through a half century or more, involving beside untold labor and expense to the Government through its accounting officers, to which there can be no visible ending, and all for the benefit rather of grasping attorneys than of the true beneficiaries in whose names the claims will be made.

Respectfully submitted.

B. W. BRICE,
Paymaster General.

Copy of a note made by the 3d Auditor of the Treasury Department on settlement of the Paymaster General's accounts for the year 1816, viz:

$18 $\frac{67}{100}$ dol's. "Disallowed payment to (the Hon. Ballard Smith for) Abraham Longacre, ensign 6th regiment Virginia militia, for 15 days' travelling allowance. Having *voluntarily retired from the service by resignation, is not entitled to it by law.*"

"D'R SIR: Agreeably to your request I enclose the above memo."

(Signed) NATH'L FRYE, JR.,
Chief Clerk Paymaster General's Office,
City of Washington, January 13th, 1819.

Hon. BALLARD SMITH,
Of Virginia, in Congress.

I certify that the foregoing is a true copy from the records of this office.

B. W. BRICE, *P. M. G.*

PAYMASTER GENERAL'S OFFICE,
December 30th, 1870.

(Indorsed:) Report of the Paymaster Gen'l, U. S. A.

PAYMASTER GENERAL'S OFFICE,
WAR DEPARTMENT,
Washington, January 3rd, 1871.

Hon. T. H. TALBOT, *Ass't Attorney General:*

SIR: In my report of the 31st ulto. to the Secretary of War, in response to your letter of the 22nd, touching the payment of travelling allowances to discharged officers, I inadvertently omitted a material point, to wit: A resignation accepted is not a *discharge* in the technical military sense. It is a dissolution of an officer's connection with the service, a lawful relinquishment of the office, with all its incidents, but through a different procedure. The results in both are the same, so far as they effect a severance of the special relations between the Government and the officer, but they are not necessarily attended with the same conditions and rights.

Three modes are known to the law by which military office in a special incumbent may be abrogated, namely: By *discharge*, (honorable or dishonorable;) by *resignation*, duly accepted; by *dismissal*, (in various ways.) All are distinct proceedings, with technical differences attaching.

It would seem clear, therefore, that the 25th section of the act of March 3, 1799, could have had no reference to resignations, but referred exclusively to discharges in their strictest meaning. This is made altogether conclusive by the language of that section: "That whenever an officer or soldier shall be discharged," &c. Officers and soldiers (enlisted men) are here treated of conjointly. Discharges are applicable to both these classes, but resignations are not. An enlisted man cannot resign. Such procedure was never heard of in any service. Hence the patent fallacy of the argument that the resignation of an office is a "discharge" within the intent of the law.

Will you please append this to my report as a part thereof?

Very respectfully, your obedient servant,

B. W. BRICE,
Paymaster General.

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
Washington, Jan'y 4, 1871.

It appears from the records of this office that the papers hereunto appended are truly copied from the official records of this office.

E. D. TOWNSEND,
Adjutant General.

Be it known that Edward D. Townsend, who has signed the foregoing certificate, is the Adjutant General of the Army of the United States, and that to his attestation as such full faith and credit are and ought to be given.

In testimony whereof I, William W. Belknap, Secretary of War, have hereunto set my hand and caused the seal of the Department of War of the United States of America to be affixed on this fifth day of January, one thousand eight hundred and seventy-one.

[SEAL.] W'M W. BELKNAP,
Secretary of War.

(P. 1634 (vs.) 1867.)

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
December 12th, 1867.

The claim of Joseph W. Price, late 1st lieutenant 39th Iowa volunteers, for traveling allowances from New York City to Adel, Iowa, (referred by the Court of Claims for information,) is herewith respectfully returned to the Secretary of War with the following report:

I. On this individual claim, the Paymaster General of the Army has reported as follows:

"The records of this office show that 1st Lieutenant and Quartermaster Joseph W. Price, 39th Iowa volunteers, was discharged the service of the United States by Special Field Orders No. 6, Headquarters Department and Army of Tennessee, January 6th, 1865, *upon tender of resignation* based on surgeon's certificate of disability.

"Traveling allowances home were refused this officer, and, as a general practice, have been refused in all cases of discharge on tender of resignation, by reason of prohibitory rules of *immemorial usage* and practice in this office, and with the *Treasury accounting officers.*

"This prohibition applies to all officers and soldiers discharged from service upon their own request and for their own private benefit.

"In this case Lieutenant Price, instead of awaiting for a brief period the official action of the military authorities to dissolve his official contract of service, chose to anticipate it by tender of his resignation, and can thus only be regarded as released from service for his own individual advantage and benefit. He, therefore, is not entitled to commutation of traveling allowances to his home."

The refusal of the pay department, as in the foregoing, is sustained by frequent decisions of the War Department, and is in accordance with the views of the Second Comptroller of the Treasury, (see Digest, par. 1487, as follows:)

"As a general rule, an officer who voluntarily quits the service, is not entitled to travel-pay home; but when his resignation and consequent *honorable discharge* are in consequence of wounds or disability incurred in the line of his duty, it is sometimes allowed as an exception and by special decision."

It is seen that the claim of the petitioner is for "pay, subsistence, and other allowances," therefore, it is proper to remark, that even if pay and subsistence could be granted, other allowances could not. (For reason, see extract of report dated September 18, 1862, from the Judge Advocate General, copy herewith, marked 1.)

II. In regard to the general subject of travel allowances, the following is submitted:

1. The 5th section of the act, approved July 22, 1861, places the volunteer officer "on the footing, as to pay and allowances, of similar corps of the regular Army."

General Orders No. 43, of 1861, (copy herewith, marked 2,) promulgated the regulations fixing the measure of travel allowances to volunteers. That measure is the one fixed by law for regular officers. (See extract from Judge Advocate General's report, September 18, 1862, herewith, marked 1.)

Regular officers discharged *by resignation* receive no travel allowances, and therefore, the said allowances are necessarily withheld from the volunteer.

The General Order (No. 43) cited, contemplated that officers to secure travel allowances on discharge should come in with, and remain in service until the muster-out of their commands, or until the act of the United States, in that way or otherwise, had intimated to the officer that his services were no longer required. In other words, only the officers coming into service with the regiment were secured allowances to the place of muster, and those going out with it were secured similar allowances to the place of enrolment. Officers entering the service, after the muster-in of the command, forfeited the allowances, and officers leaving the service before the muster-out of their command, did the same.

The Government, as an indulgence, permitted officers to honorably leave the service *by resignation* whilst the command remained in, but, by the act, it could not be said that the services of the officer were no longer required, for another officer became necessary to replace the one discharged, and the officer making the replacement would be, provided he remained till the muster-out of the command, the one to receive the allowances provided on discharge.

It is thus seen that the ruling, as indicated, looked to granting the *discharge allowances* to but one set of officers—those who properly belonged to the command at the date of its final discharge. A different one would have made the public interest subordinate to the indulgence of individuals, and for individual advantage and benefit. The cost of this indulgence would have been at least $6,000,000, as upwards of 40,000 officers were discharged by resignation, and the average to each officer for the travel allowance, would have been at least $150.

2. The refusal to grant travel allowances in case of discharge by resignation has been uniformily adhered to by the War Department, and the principle has even been extended, and made applicable to a case where an officer was regularly mustered out with his command. (See copy of report to the Secretary of War, dated October 22, 1866, herewith, marked 3.)

A reference to that report makes it necessary to remark that, as a general thing, during the rebellion, an organization leaving the service by muster-out was furnished transportation in kind by the United States, so that no money allowances for travel fell to the officers mustered out with it; such was the case with the regiment (39th Iowa volunteers) to which the claimant belonged, and this holding, evident injustice would have been done the officers mustered out with the command, had the War Department sanctioned a claim for travel allowances to any one officer leaving the regiment before its muster-out; such action would, in effect, have given the officer whose convenience was consulted, and who was thus relieved from all care of the enlisted men and property of

the command, more remuneration than was allowed the officer to whom all that responsibility attached.

The rulings of the War Department, therefore, have been legal; have looked to the economy of the public service; and, withal, have been just to the individual and the Government.

The papers from the Court of Claims are herewith returned.

(Signed) E. D. TOWNSEND,
Assistant Adjutant General.

[General Orders, No. 43.]

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
Washington, July 10, 1861.

Commissioned officers of volunteers received into the service of the United States for two and three years or for the period of the war, will be entitled to receive one day's pay and subsistence for every twenty miles travel from the place of enrollment to the place of muster into service of the United States, and from the place of discharge to the place of enrollment,—the distance to be estimated by the most direct mail route.

By order:

L. THOMAS,
Adjutant General.

Official:

Assistant Adjutant General.

Claim of Eugene Sullivan, late lieutenant 1st U. S. colored cavalry.

3] WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
October 22d, 1866.

Major General Canby, by telegraph of July 7th, 1865, reported as follows:

"A considerable number of officers and men from the troops about to be mustered out, desire to be discharged here, *in order to engage in business.* I recommend that this be authorized."

The recommendation was approved by the General-in-Chief and the Secretary of War, and by telegram of July 8th, General Canby was informed that "The troops about to be mustered out, who desire to be discharged at the points where their commands are mustered out, can be so discharged."

The claimant took advantage of the indulgence, and thereby voluntarily waived the privilege *of transportation in kind* which was furnished his regiment, to the rendezvous where mustered-in. The act was for his own convenience, and in electing to be so discharged, he was relieved from further responsibility and labor with his company, and the same devolved on the officers who accompanied the enlisted men. *The officers upon whom the increased labor and responsibility fell, received transporta-*

tion in kind, only. The transportation does not go into their pockets, and to allow the claimant a money allowance for transportation, would be to give him more than the officers who did the work.

It is a well settled general principle that when an officer's convenience is consulted, be it by resignation or otherwise, on his leaving the service he forfeits his traveling allowances, and what is stated herein in regard to the present case, illustrates the justice of the principle.

It is respectfully submitted, that the claim should be rejected; there is no law on which it can be justly based.

(Signed) THOMAS M. VINCENT,
Assistant Adjutant General.

Approved:
(Signed) E. M. STANTON,
Sec'y of War.

OCT. 27, 1866.

TREASURY DEPARTMENT.

Be it remembered that Allan Rutherford, esq., who certified the annexed copies, is now, and was at the time of doing so, Third Auditor of the Treasury, and that full faith and credit are due to his official attestations.

In testimony whereof I, George S. Boutwell, Secretary of the Treasury of the United States, have hereunto subscribed my name, and caused to be affixed the seal of this Department, at the city of Washington, this 6th day of January, in the year of our Lord 1871.

[SEAL.] GEO. S. BOUTWELL,
Secretary of the Treasury.

TREASURY DEPARTMENT,
THIRD AUDITOR'S OFFICE,
January 6, 1871.

I, Allan Rutherford, Third Auditor of the Treasury of the United States, hereby certify that the annexed are true copies of papers on file with the claim for pay, &c., of Abraham Longaker, ensign 6th Virginia militia, in the service of the United States, in 1814, on file in this office.

ALLAN RUTHERFORD, *Auditor.*

[Gen. orders.]

ADJUTANT GENERAL'S OFFICE,
Norfolk, 23 *Sept.*, 1814.

The resignation of Abraham Longaker, en. in the 6th regiment Va. militia, is accepted this day, and he is at liberty to retire from service.

JAMES BANKHEAD,
Adjutant Gen'l.

ARMY PAY OFFICE,
City of Washington, March 11th, 1816.

I hereby certify that there is due to Abraham Longaker, ensign of Virginia militia, of the regiment of , the sum of forty-seven dollars and ninety-six cents, for his pay and emoluments from 31st August, 1814, to 7th October, 1814, including travelling allowance.

Pay	25 16
Subsistence	22 80
Forage	-----
Clothing	-----
	$47 96

ROB'T BRENT,
Paymaster of the United States Army.

No. 2480.

The Secretary of War to Robert Brent, Paymaster of the Army of the United States.

SIR: Pay to Abraham Longaker, ensign of Virginia militia, of the regiment of , the sum of forty-seven dollars and 96 cents, being so much due him, as appears by your certificate annexed, for his pay and emoluments from 31st August, 1814, to 7 October, 1814, including travelling allowances, taking his receipt therefor, for which payment this shall be your warrant.

Given at the War Office of the United States, at the city of Washington, in the District of Columbia, this 11th day of March anno Domini, 1816.

WM H. CRAWFORD,
Secretary of War.

Subsistence account of Ensign Abraham Longaker, of the 6th regiment of Virginia militia, in the service of the United States.

Commencement.	Expiration.	No. of days.	No. of rations per day.	Total No. of rations.	Port or place where due.	Price of rations.	Amount.*	
						Cents.	Dolls.	Cents.
31 August, 1814.	7 Oct., 1814.	38	3	114	Norfolk.	20	22	80

*Fifteen days allowed for travelling from Norfolk home to Greenbriar County, it being three hundred miles.

I certify on honor that the above subsistence account is accurate and just, amounting to twenty-two dollars and eighty cents; and that I have not drawn rations in kind, or received money in lieu thereof, from the United States, for or during any part of the time therein charged, and that the distance from Norfolk to my place of residence, in the county of Greenbrier, is three hundred miles.

[Signed duplicates hereof.]

ABRAHAM LONGAKER.

Received of , this day of 181 , the sum of twenty-two dollars and eighty cents, in full payment of my subsistence from the 31 Aug't, 1814, to the 7th October, 1814, having signed duplicates hereof.

ABRAHAM LONGAKER.

Warr't 2480.

The United States, to Ensign Abraham Longaker, of the 6th regiment of Virginia militia, in the service of the U. States, DR.

For his pay from the 31st Aug't, 1814, to the 7th Oct., 1814, at $20 per month—1 month and 8 days—allowing 15 days for travelling home from Norfolk, it being three hundred miles	$25 29
For his subsistence account herewith	$22 80
	$48 09
Deduct 13 cents, being an error in the calculation of his pay	13
	$47 96.

I certify on honor that the foregoing account is accurate and just, and that I have not received compensation for any part of the time charged as above; and that the distance from Norfolk to my place of residence is three hundred miles.

[Signed duplicates.]

ABRAHAM LONGAKER.

Received of , this day of 181 , the sum of forty-eight dollars and nine cents, in full for my pay and subsistence up to the 7th day of October, 1814.

[Signed duplicates.]

ABRAHAM LONGAKER.

Pay	$25 29
Subsistence	22 80
	48 09
*Pay	$25 16
Sub	22 80
	$47 96

Received of Robert Brent, paymaster of the Army, the sum of $47 96 in full of the above account, 11th March, 1816.

BALLARD SMITH.

TREASURY DEPARTMENT.

Be it remembered, that Allan Rutherford, esq., who certified the annexed copies, is now, and was at the time of doing so, Third Auditor of the Treasury, and that full faith and credit are due to his official attestations.

In testimony whereof I, George S. Boutwell, Secretary of the Treasury of the United States, have hereunto subscribed my name, and caused to be affixed the seal of this Department, at the city of Washington, this 10th day of January, in the year of our Lord 1871.

GEO. S. BOUTWELL,
Secretary of the Treasury.

TREASURY DEPARTMENT,
THIRD AUDITOR'S OFFICE,
January 10, 1871.

I, Allan Rutherford, Third Auditor of the Treasury of the United States, hereby certify that the papers herewith are true copies of accounts on file in this office of Joseph Bender, third lieutenant, 32d infantry, war of 1812, and of William Marr, ensign, 33d United States Infantry, war of 1812.

ALLAN RUTHERFORD,
Auditor.

DR., *The United States in subsistence account with William Marr, ensign of 33d regiment of U. S. Infantry.*

Subsistence.	Commencing.	Expiring.	Number of days.	Number of rations per day.	Total number of rations.	Place where due.	Price of the ration. Cents.	Amount. Dolls.	cents.	Remarks.
For myself....	January 1, 1814..	March 19, 1814...	77	2	154	Plattsburgh	c 20	30	80	Last paid to 31st Dec., 1813, by Joseph C. Boyd, esquire, D. P. M., at Portland, Maine. My resignation was accepted to take effect on 19th March, 1814.
For servant not soldier.										

I certify on honor that the above subsistence account, amounting to thirty $\frac{80}{100}$ dollars, is accurate and just, and that I have not drawn rations in kind from the United States, or money in lieu thereof, for or during any part of the time as above charged; that I actually employed and kept in service the waiter charged, not of the Army; and that I did not, during the time so charged, keep or employ, as waiters or servants, soldiers from the line of the Army.

(Signed duplicates hereof.)

WILLIAM MARRS, *Ensign.*

I certify that the calculations and additions of the above account have been by me examined, and the sum of thirty & $\frac{80}{100}$ dollars appears due thereon.

JEREMIAH GOODWIN, *L't & P. M. 33rd Infantry.*

[Endorsed.]

PLATTSBUGH, N. Y.

Received of Jeremiah Goodwin, first lieutenant and paymaster of the 33rd regiment of infantry, this twenty-first day of March, 1814, thirty dollars and eighty cents in full payment of my subsistence from the first day of January, 1814, to the 19th of March, 1814, the day on which my resignation was accepted.

(Signed duplicates hereof.)

30 $\frac{80}{100}$

WILLIAM MARRS, *Late Ensign* 33.

33rd reg.] [Vou. 52

Late ensign W'm Marr, for subsistence from 1st Jan'y to 19th March, 1814, the day on which he resigned.
Paid 21st March, 1814, subsistence..... 30 80
Voucher No. 52 to the acc't of Lieut. Jeremiah Goodwin, paym. 33d reg.

Pay-roll of a company of infantry commanded by Capt. John Steele, jun'r, of the 32d regiment United States Infantry, for the months of Oct. & November, 1813.

No.	Names.	Rank.	Commencement of service or of this settlement.	Expiration of service, or of this settlement.	Terms of service charged.		Pay per month.	Amount of pay.		Remarks.
					Months.	Days.		Dollars.	Cents.	
4	Joseph Bender....	3d lieut	30 Sept'r, 1813.....	5 Novem., 1813	1	04	23	26	06	Resigned 5 Nov'r, 1813,
								1,994	52	

I certify that this pay-roll has been by me examined and compared with the original muster-roll of said company, now in my possession, and that the sums stated, amounting to one thousand nine hundred and ninety-four dollars and fifty-two cents, were due from the United States to Capt. John Steele, jun'r's, company of the thirty-second regiment of infantry, on the thirtieth day of November, 1813; having signed duplicates hereof.

Pay 1,994 $\frac{52}{100}$ dollars.

WM CROZIER,
Lieut., P. M. 32d Inf'y.

(Endorsed:) No. 40. Pay-roll of Capt. John Steele's company, 32d reg't of U. S. Infantry, for October and Nov., 1813.

22

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
January 11th, 1871.

I hereby certify that it appears from Gardner's United States Army Dictionary, a book compiled with great care, and mainly from the data and records of the War Department, that Joseph Bender, 16th regiment United States Infantry, war of 1812, was promoted from an ensign to a third lieutenant, April 1st, 1813, and resigned November 5th, 1813, and that his place of residence was the State of Pennsylvania.

E. D. TOWNSEND,
Adjutant General.

TREASURY DEPARTMENT,
THIRD AUDITOR'S OFFICE,
January 11th, 1871.

I hereby certify that it appears from the records of this office that the 32d regiment United States Infantry, of which Lieutenant Joseph Bender was an officer, was raised in the State of Pennsylvania, and was mustered out of service at Governor's Island, State of New York, on the 1st day of May, 1815; that Lieutenant Bender resigned November 5th, 1813, and was paid the sum of $26 06—no extra pay or traveling allowance being included.

ALLAN RUTHERFORD,
Third Auditor.

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
January 11th, 1871.

I hereby certify that it appears from Gardner's United States Army Dictionary, a book compiled with great care, and mainly from the data and records of the War Department, that Ensign William Marr, 33rd regiment United States Infantry, of the war of 1812, resigned March 19th, 1814, and that his place of residence was the State of Maine.

E. D. TOWNSEND,
Adjutant General.

TREASURY DEPARTMENT,
THIRD AUDITOR'S OFFICE,
January 11th, 1871.

I hereby certify that it appears from the records of this office that Ensign William Marr, 33d regiment United States Infantry, war of 1812, resigned at Plattsburgh, New York, his resignation to take effect March 19th, 1814, and that, on the 21st day of March, 1814, he was paid in full by Paymaster Jeremiah Goodwin, the sum of thirty dollars and eighty cents, ($30 80,) being for service from the 1st of January, 1814, to March 19th, 1814—no extra-pay or traveling allowances being allowed him.

ALLAN RUTHERFORD,
Third Auditor.

PAYMASTER GENERAL'S OFFICE,
WAR DEPARTMENT,
Washington, December 31st, 1870.

Computation of the commuted traveling allowances of a first lieutenant of infantry volunteers from New York City to Adel, Dallas County, Iowa, in 1865, being at the rate of one (1) day's pay proper and four (4) rations, @ 30c. per ration, for every twenty (20) miles' travel—

New York City to Des Moines	1,255	miles	
Des Moines to Adel	25	"	
Total	1,280		=64 days.
64 days=2 months 4 days @ $50 per mo			$106 66
64 " @ 4 rations per day @ 30c per ration=$1 20 per day			76 80
Total amount			$183 46

B. W. BRICE,
Paymaster General.

INDEX OF PAPERS ACCOMPANYING BRIEF FOR UNITED STAT

I.

Second Comptroller:
Letter, January 5, 1871, forwarding—
Decision of July 8, 1864, (Weevil, brigade surgeon, United States volunteers 4
April 28, 1855, (Bridges, enlisted man) 5

Second Auditor:
Letter, January 3, 1871, forwarding—
Decision Second Comptroller, November 20, 1851, (Lieutnant Tully) 6
Second Auditor, April 9, 1862, (Lieutenant Tully) 7
Secretary of War, May 31, 1852, (Lieutenant Tully) 7
Second Comptroller, May 27, 1851, (Lieutenant Day) 8
Second Auditor, November 28, 1851, (Captain Davis) 8
Second Auditor, November 18, 1851, (Robinson) 9
Second Auditor, May 14, 1869, (Lieutenant Carman Van Anda) .. 9
Second Auditor, December 6, 1867, (Lieutenant Colonel Bisbee.) . 9

Adjutant General:
Certificate of January 4, 1871, forwarding—
Report of December 12, 1867 10
General Order, No. 43, July 10, 1861 16
Decision, October 22, 1866, Lieutenant Sullivan 16

Third Auditor:
Letter, January 6, 1871, forwarding—
Account, March 11, 1816, (Ensign Longaker) 18
Report, January 10, 1871, forwarding—
Account, March 21, 1814, (Ensign Marr) 21
Pay-roll, Captain Steele, junior, October and November, 1813 22

Paymaster General:
Letter, December 31, 1870, forwarding—
Decision of 3d Auditor, January 13, 1819, (Lieutenant Longacre) 10
Letter of January 3, 1871 13
Certificate of Adjutant General, January 11, 1871, (Lieutenant Joseph Bender) . 23
Third Auditor, January 11, 1871, (Lieutenant Joseph Bender) ... 23
Adjutant General, January 11, 1871, (Ensign Marr) 23
Third Auditor, January 11, 1871, (Ensign Marr) 23

II.

Paymaster General, forwarding—
Computation of traveling allowances, December 31, 1870 24

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WAR DEPARTMENT,
Washington, December 31st, 1870.

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Second Auditor, November 28, 1851, (Captain Davis) 8
Second Auditor, November 18, 1851, (Robinson) 9
Second Auditor, May 14, 1869, (Lieutenant Carman Van Anda) .. 9
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Letter of January 3, 1871 13
Certificate of Adjutant General, January 11, 1871, (Lieutenant Joseph Bender) . 23
Third Auditor, January 11, 1871, (Lieutenant Joseph Bender) ... 23
Adjutant General, January 11, 1871, (Ensign Marr) 23
Third Auditor, January 11, 1871, (Ensign Marr) 23

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2 Drawings/1857

Supreme Court of the United States.

DECEMBER TERM, 1870.—No. 60.

THE UNITED STATES, Appellant,

vs.

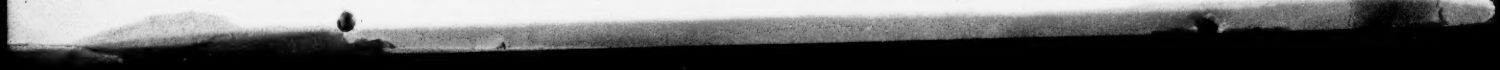
JOSEPH W. PRICE.

APPEAL FROM THE COURT OF CLAIMS.

Argument for Defendant on the Second Hearing,

By N. P. CHIPMAN, of Counsel.

McGill & Witherow, Printers and Stereotypers, 1107 E street, Washington, D. C.



Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, Appellant,
vs.
JOSEPH W. PRICE.

No. 60.—Appeal from the Court of Claims.

ARGUMENT FOR DEFENDANT ON THE SECOND HEARING.

By N. P. CHIPMAN, *of Counsel.*

FACTS.

The following are the findings of facts certified to the Supreme Court by the Court of Claims:

"In this case the court, upon due consideration of the premises, find the following facts:

"Joseph W. Price, the claimant, a loyal citizen of the United States, having tendered his resignation as first lieutenant, thirty-ninth Iowa volunteers, based on surgeon's certificate of disability, was honorably discharged the service of the United States January 6, 1865, at the headquarters department of Tennessee, Savannah, Georgia. He had been enrolled in said service, and his residence at the time of his enrollment and of his discharge was Adel, in Iowa. Upon his discharge he returned to Adel, without allowance of transportation pay; and the court ruled, as conclusion of law, that the claimant, upon such discharge, was entitled to transportation pay, to wit, one day's pay and allowance for each twenty miles of travel from the place of such discharge to the place of enrollment aforesaid, and accordingly give judgment for the sum of $234."

This case, your honors, has greater importance than would appear from anything said at the first hearing. I represent but one client in this case, but other persons have made common cause with him, and await with much interest the decision you may render. The court has recognized the importance of the case in its order for reargument, and I feel bound to presume that I am warranted in going over the whole case, and as elaborately as I may deem necessary to its full comprehension. It is true the court suggested two points to be specially considered by counsel; but I beg the court may permit me, while not overlooking those points, to present the case in its completeness.

The points suggested by the court are—

First. What has been the practical construction of the 25th section of the act of the 3d of March, 1799, and of the subsequent acts of Congress on the same subject by the accounting officers of the Treasury; and in cases where such claims have been allowed, if any, what have been the items of allowance?

Second. What are the items allowed in the decree of the Court of Claims, from which appeal is taken?

The first of these I shall answer fully in proper place, and the second involves a matter of computation under the law, as to which my learned friend who represents the Government and I will not differ.

A close view of the case since the former hearing has simplified it very much, so far as the statutes involved are concerned. The act of Congress in force and on which the claim in part rests is the act of January 29, 1813, section 15. (2 Stats., 794, 795.) The section reads as follows:

"That whenever any officer or soldier shall be discharged from the service, except by way of punishment for an offense, he shall be allowed his pay and rations, or an equivalent in money, for such term or time as shall be sufficient for him to travel from the place of discharge to the place of his residence, computing at the rate of twenty miles to a day."

Several prior statutes have been cited of similar import, but they have been superseded from time to time, and are now obsolete. We need not, therefore, consider them.

The defendant was a commissioned officer of the volunteer army, and was honorably discharged the service, at his own request, by tendering his resignation, based on surgeon's certificate of disability.

QUESTION.

The precise question is, did he forfeit this statutory travel-pay or allowance by having been discharged at his own request?

I ought perhaps here to observe that the statute quoted would not govern this case unless we first show that Congress extended its provisions to volunteers. This will appear, and is not denied now, I believe, by section 5th, act July 22, 1861, whereby volunteers were placed on the footing as to pay and allowances of similar corps in the regular army.

First. Let us then examine the statute of 1813, without regard to anything outside of it, and ascertain if we can its meaning. A maxim of interpretation directs us first to determine the meaning of statutes by their language, and if from the words used this can be done, we cannot go beyond.

As the learned assistant Attorney General makes no strong effort to derive any meaning from the statute other than we give it, I shall content myself with repeating the brief analysis given in the first hearing.

Notice, then, first, That the language settles the question of time by the use of a well-understood word, namely, "whenever." Webster defines this word to mean "at whatever time," and he gives no other meaning; nor, indeed, would it seem susceptible of any other. The law then means *at whatever time any officer shall be discharged from the service, &c.* Now, if it had been intended to limit this pay to officers who remained in service for a definite period, that period would have been stated; and, if stated, the word "whenever" would not have been used at all, as it would then have been out of place and meaningless.

Notice, second, The use of the word "*any*," which cannot be made more clearly to embrace *all*. If, therefore, the law read, "*whenever any* officer shall be discharged from the service, he shall be allowed," &c., no one would doubt for a moment, on reading it, that *all* officers discharged, *at whatever time*, should be paid the allowance. But,

Notice, third, Congress takes one class of officers out of the operation of the statute, by adding to the words above quoted the following: "Except by way of punishment for an offense." No other exception is made.

From a natural reading of the act, is it not true that any officer, whenever discharged, and from whatever cause, except by way of punishment for an offense, is entitled to the pay? But for the exception, could any be deprived of it? And does the exception reach any not embraced in it? Look at the language again: "Discharged from the service." This cannot be obscure. To discharge means, according to Webster, "to relieve of an office or employment; to send away from service; to dismiss." Could the law have been written in purer or more unequivocal English?

Look at the exception. Does it in any way control the meaning of the previous language, further than to confine it to those who are not discharged "by way of punishment?"

And have we not, by the use of the exception, the strongest proof that no others but those discharged by way of punishment were to be deprived of the pay? "*Exceptio unius est exclusio alterius*" is a maxim peculiarly in point here. (Broom's Maxims, London, 1864, p. 626.)

But this plain and manifest reading does no violence to what would seem to have been the purpose of the legislature; allowing, for the moment, that we may conjecture as to that purpose.

The design of the law was to give to the officer the means of returning to his home after he left the service, and the necessity for such provision was not changed, whether he resigned or was discharged on motion of the Government, and against his wish. But Congress might well except those officers who were dismissed for some offense, and this Con-

gress did, but no more. Furthermore, this was an inducement to enter the army. Officers were liable to be taken wherever the Government might choose, and as they might be discharged at a great distance from home, involving large outlay to return, the law would seem but simple justice.

Second. The second legal ground upon which we rest our case is the promise made by the President, through an order of the War Department, issued pursuant to his proclamation of May 3, 1861, calling troops into service before legislation could be had. This order is as follows:

"WAR DEPARTMENT,
"ADJUTANT GENERAL'S OFFICE,
"WASHINGTON, *July* 10, 1861.

General Orders No. 43.

"Commissioned officers of volunteers received into the service of the United States for two and three years, or for the period of the war, will be entitled to receive one day's pay and subsistence for every twenty miles travel from the place of enrollment to the place of muster into service of the United States, and from the place of discharge to the place of enrollment; the distance to be estimated by the most direct mail route. By order:

L. THOMAS,
"*Adjutant General.*

"Official:
"THOMAS M. VINCENT,
"*Assistant Adjutant General.*"

It will be observed, upon reading the order, that the only exception mentioned in the statute of 1813, as to discharges by way of punishment, is omitted, and the travel pay is promised, without restriction, to officers received into the volunteer service upon discharge therefrom.

This is a distinct promise, forming a part of the contract of enlistment, and is wholly independent of previous legislation. No usage can be plead here as to officers discharged upon resignation, for no usage could obtain prior to its issuance.

The right of the President to make this promise, there

being then no statute on the subject, I think will not be questioned.

Gratiot *vs.* The United States, 4 How., 80.
The United States *vs.* Eliason, 16 Pet., 291.
The United States *vs.* Duval, Gilp., 357.

But if the President had no right to promise this allowance, I insist that it was made binding by act of Congress of August 6, 1861, section 3. (12 Stats., 326.) That section reads as follows:

"That all the acts, proclamations, and orders of the President of the United States, after the 4th of March, 1861, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and dictation of the Congress of the United States."

The proposition I have just stated is no longer open to argument; it is *res judicata*. This court, in the Hosmer Bounty Case, (9 Wall, 432,) has set the question at rest. I invite attention to this decision. It goes far to establish the right for which I contend, in addition to holding the order validated. Hosmer was a soldier. The order in his case promised him bounty whenever discharged. No condition was named beyond this, as there was none in the promise of travel-pay in Order 43. The department sought to impose the condition of two years' service before discharge, but this court said no. The law cannot be thus amended by construction.

By the act of July 22, 1861, two years' service were made requisite to obtaining the bounty of $100. But the act of August 6, 1861, legalized the order of May 4, and this court held that the act of July 22, 1861, did not limit the promise made May 4, 1861, and ratified August 6, 1861.

To say the least, there was expressed by Congress, in the act of July 22, 1861, a principle, making two years requisite in obtaining bounty; yet this court was not disturbed by that intervening statute, and it gave to Hosmer the bounty, although he had served but six months.

In the case at bar, between the Order No. 43, of July 10, 1861, and the act of August 6, 1861, there is no intervening statute, not even an intervening adverse departmental construction. The earlier acts we have cited cannot be invoked, for they relate to the regular army, and were not extended to volunteers until July 22, 1861. And even if these earlier acts are made to intervene, they only serve to add legislative sanction to the promise held out in General Order 43, afterwards ratified.

Third. We find a third legal ground on which to rest the case in Army Regulations, 1861, ¶ 1338, p. 344.

I read from the Regulations:

"The traveling pay is due to a discharged officer or soldier unless forfeited by sentence of a court-martial, or as provided in paragraph 1340, or the discharge is by way of punishment for an offense."

These Regulations are law.

Gratiot *vs.* The United States, 4 How., 80.

Digest Judge Advocate General, note to page 56, edition of 1868.

Digest of Comptroller, title Army Regulations.

To the strictly legal view of the case thus presented I think there can be no sound objection made.

POSITION TAKEN BY THE ATTORNEY GENERAL.

The answer of the Government is contained in the proposition of the Attorney General, page 2, of his brief. He says:

"Against the allowance of this claim an irresistible argument may be found in the uniform construction given to statutes regarding the matter."

It is to the point here raised, I suppose, that the court directed counsel to examine the construction given the case by the departments.

I will now state the result of my researches into the facts. I do not see, however, how your honors can amend the record now, and permit judgment to rest upon anything coming from counsel as a statement of facts. The account-

ing officers of the Treasury cannot send in a statement of what the construction has been which this court would receive. Indeed, the case must be tried upon the record. I think, however, that it may be competent to present any rulings of department to be considered for what they are worth, and for this purpose I have carefully examined the records of the Comptroller's office, so far as I was allowed access to them, and what I there found I will give.

OPINIONS OF SECOND COMPTROLLER.

The opinions of the Second Comptroller of the Treasury Department, who is by law made the supervisor of accounts of army disbursing officers, (see act March 3, 1817, 3 Stats., 366,) are contained in letter-books, marked volume 1 to volume 32 inclusive, commencing March 4, 1817, and continuing to the present time, covering the whole period of existence of that office.

Upon a personal inspection of the volumes, I find that they contain decisions or opinions covering periods as follows:

Volume 1, March 4, 1817, to August 15, 1823.
Volume 2, August 18, 1823, to April 30, 1829.
Volume 3, April 30, 1829, to April 20, 1832.
Volume 4, April 20, 1832, to March 25, 1837.
Volume 5, February 24, 1834, to August 19, 1836.
Volume 6, August 20, 1836, to August 16, 1838.
Volume 7, August 16, 1838, to August 12, 1839.
Volume 8, August 13, 1839, to August 12, 1841.
Volume 9, August 21, 1841, to May 20, 1843.
Volume 10, May 20, 1843, to February 21, 1845.
Volume 11, February 21, 1845, to May 28, 1847.
Volume 12, May 28, 1847, to April 13, 1849.
Volume 13, April 4, 1849, to July 2, 1850.
Volume 14, July 2, 1850, to October 6, 1851.
Volume 15, October 6, 1851, to December 4, 1852.
Volume 16, December 5, 1852, to January 4, 1854.
Volume 17, January 5, 1854, to January 24, 1855.

Volume 18, January 24, 1855, to September 17, 1855.
Volume 19, September 17, 1855, to October 18, 1856.
Volume 20, October 20, 1856, to April 26, 1858.
Volume 21, April 26, 1858, to June 4, 1859.
Volume 22, June 4, 1859, to March 30, 1861.
Volume 23, April 1, 1861, to April 19, 1862.
Volume 24, April 19, 1862, to March 27, 1863.
Volume 25, March 28, 1863, to March 4, 1864.
Volume 26, March 4, 1864, to August 27, 1864.
Volume 27, August 29, 1864, to May 31, 1865.
Volume 28, June 2, 1865, to February 28, 1866.
Volume 29, March 1, 1866, to January 3, 1867.
Volume 30, January 3, 1867, to November 25, 1867.
Volume 31, November 25, 1867, to December 4, 1868.
Volume 32, December 4, 1868, to

These decisions or opinions are made up of letters to individuals, indorsements on accounts in passing through the department for settlement, letters to heads of bureaus and disbursing officers, &c., made in the current administration of the office of Comptroller.

They were sealed books to all except those who chose to go to the office and pore over their pages to learn what they contained until, in 1852, George Chipman, Esq., a clerk in the office, put the more important decisions in a convenient digested form. This little book was published for the convenience of the department. The Comptroller says, in his preface to edition of 1865: "In 1857 I had partially prepared a continuation of the work, but various circumstances prevented its completion, and in the meantime the useful compilation of Judge Chipman had gone entirely out of print."

In 1865 *an enlarged digest was published*, and was more accessible, but is hardly known out of Washington city.

In 1869 *another edition issued*, and is the one cited by counsel in second briefs and arguments.

Since 1817, when the office of Comptroller was established, the question here to be decided could have been authoritatively decided only by him, and it is idle to search elsewhere

for rulings; for if any were made, they came from those whose judgment had to be reviewed by him.

I have searched faithfully, with the view of laying before court *all* that is known on the subject; I have consulted with officers in and out of the army, paymasters, old clerks in the departments, and have searched for old records, and I here say, as the result of it all, that there is nothing to be learned, which can be stated definitely, prior to the organization of the Comptroller's office. All before that comes to us by tradition, handed down from the lips of man, and no two will agree as to what the precise rule was, or rather is said to have been.

Certainly the court will not follow the counsel while floundering about in the dust and mould of that mythical period. If rules of law are worth anything, they should hold counsel to the realm of certainty. The broad statement is made, that the act of Congress giving travel-pay to officers whenever discharged, except as punishment for an offense, has been uniformly held by the departments not to include in its benefits officers who resign or quit the service at their own request, and that this construction has obtained since 1799. This is an assertion that must rest upon fact, and not upon conjecture. There is nothing but conjecture prior to the opinions given by the Comptroller, and it must be rejected as such.

Before examining particularly what has been decided, and is *now* known to have been decided, I ought, perhaps, to say that there is no published digest of any of the opinions of the War Department, where we would naturally turn to ascertain the law as administered prior to 1817. And, possessing some little knowledge of the organization of that department, (having served in it nearly three years,) I could not tell your honors where to look for any decision showing the rule as to travel-pay which obtained before 1817.

Are the unknown and, I might say, secret archives of the War Department to be searched *after this trial* to establish a usage in violatian of law, and thus bar my client of a claim accruing six years ago?

It may be said that we should examine the decisions of the Paymaster General, who administered the law prior to 1817. I answer that here we are in the same predicament. That officer, in 1864, published a manual for the guidance of paymasters, and subsequently several editions have followed, but they all contain chiefly the decisions of the accounting officers as to pay accounts, and most of them are decisions since and during the rebellion. But these manuals are not, and do not purport to be, a digest of decisions from the organization of the pay department.

The Judge Advocate General also passed upon many questions pertaining to army pay, but his bureau is the growth of the war, and his first digest was published in 1864.

We are left then to the decisons of the Comptroller only. And what do they show?

Volumes 1 and 2, covering a period from March 4, 1817, to April 20, 1829, contain nothing on the subject of travel-pay.

Volume 3 contains the first decision on the subject, (p. 498.) I read this decision entire, as follows:

APRIL 7, 1832.

SIR: I herewith return the letter of Captain H. Smith, of the 15th, and private Ira R. Price, of the 13th March ultimo, respecting the allowance of traveling pay and rations to *soldiers* discharged under order of the 8th of June, 1830, which was referred to this office on the 30th ultimo.

From a due consideration of the case I am of the opinion that soldiers so discharged from the army are not entitled to traveling pay or rations from the place of discharge to their place of residence; because such discharges are never granted but at the request of the soldiers, and for their own pleasure and convenience, and because the moneys received from soldiers discharged under said order are expressly appropriated "to reimburse the recruiting funds against losses which thus necessarily arise." I have to request that the paymasters may be advised of this decision, as such payments will be disallowed in the settlement of their accounts.

I am, respectfully, J. B. THORNTON,
Comptroller.

Col. N. TOWSON, *Paymaster General.*

N. B.—A copy of the above letter was furnished the Second Auditor.

It requires no very close analysis of this letter to show how far short it falls of establishing any definite construction of any law; how utterly destitute it is of any intimation that it is written in pursuance of immemorial usage. Indeed, no one can read it, standing unaided, and say what it means to decide.

First. The decision is based upon the fact that the soldiers were discharged under an order of June 8, 1830, but the order is not given nor its purport stated.

Second. The Comptroller, "on due consideration," is of opinion that soldiers *so* discharged, *i. e.*, as prescribed in this particular order, are not entitled to travel-pay, because *such* discharges, *i. e.*, discharges under this order, are never granted but at the request of the soldiers, and for their own convenience and pleasure; and because, further, "The moneys received from soldiers discharged under said order are expressly appropriated 'to reimburse the recruiting fund against losses which thus necessarily arise.'"

How is it possible to make a definite rule of this decision without the order mentioned before you? And when you have the order, it will be seen that "moneys received from soldiers discharged under it are expressly appropriated to reimburse the recruiting fund." No mention is made in the decision of any law of Congress construed; the whole opinion rests upon an order not given, or its purport stated, in the opinion. How can usage grow out of such vagueness?

But we shall see, as we approach the labyrinth of decisions on this subject, that the only point in this decision, namely, that the soldiers were discharged at their own request, on which the Government relies, has varied in many cases, and is not a fixed rule either as to officers or privates. It must not be forgotten either that this decision does not touch the case of an *officer* at all.

In following the volumes in their order, I find no further decisions on the subject of travel-pay either in volumes 4, 5 or 6; volume 7 contains a decision, (page 413,) (Digest, p. 282, ¶ 2181,) as follows:

Lieut. GEORGE F. LINDSAY,
Assistant Quartermaster of Marines, Philadelphia.

SIR: I have examined the question raised in yours of the 7th instant, and find the practice in the army to be as you state, viz: to pay a soldier who re-enlists under the act of March, 1833, for transportation to his home or the place of enlistment. As the act by express terms relates to the marine corps as well as the army, the accounting officers have concluded to adopt the army practice, as above mentioned, in the settlement of the accounts of the marine corps.

A. K. PARRIS,
Comptroller.

I give this, not as bearing specially on the case, but as being the next decision in order of time. It establishes the right of the soldier or marine under the act of 1833 to re-enlist and get his travel-pay home whether he makes the journey or not; a right many times, afterwards acted upon, and, as we shall show, establishes the fact that travel-pay is an emolument or part of the pay, and not merely reimbursement, as where mileage is paid.

Volumes 8, 9, and 10 contain no decisions on travel-pay.

Volume 11, p. 267, (Digest, p. 282, ¶ 2183,) contains the following:

JUNE 17, 1846.

Gen. N. TOWSON,
Paymaster General.

SIR: In reply to the inquiry from your office of this date as to the allowance to which volunteers under the act of May 13, 1846, are entitled for their travel to their place of rendezvous, I have to state that they are entitled to one day's pay and subsistence for every twenty miles' travel from their place of residence to the place of general rendezvous, and all mounted privates, non-commissioned officers, and artificers are allowed, in addition to the above, forty cents per day for the use and risk of their horses and legal allowances for forage. Respectfully, &c.,

ALBION K. PARRIS,
Comptroller.

Here was a particular act construed, but not the act in question in this case.

Volume 12, p. 34, contains a decision, (Digest, p. 283, ¶ 2179,) as follows:

JULY 9, 1847.

Maj. GEO. H. RINGGOLD,
Paymaster U. S. Army.

SIR: In reply to your note asking my decision on the case of Lieut. Fellmagle I have to state, that if he was discharged under circumstances that entitle him to the benefits of the provision of the 15th section of the act of January 29, 1813, as I presume he was, he having been discharged on surgeon's certificate, he is entitled to his traveling allowances, under said section, from the place where he was when his discharge took effect to the place of his residence. He had leave of absence for one month, during which, at twenty miles a day, he could not have marched farther than New Orleans; and as he was not transported at the public expense from Talapa to New Orleans, and as the month's leave of absence expired on arriving at the latter place, I think he should receive his traveling allowances from thence to his place of residence.

Very respectfully, your obedient servant,

ALBION K. PARRIS,
Comptroller.

The Attorney General would hardly urge that we have here any definite rule or construction which precludes resigned officers from travel-pay.

It does not touch the question of resigned officers. It presumes that the officer was discharged under circumstances which entitled him to travel-pay. What is the fact upon which this presumption rests? The Comptroller states it to be, that the officer was "discharged on surgeon's certificate of disability." This, your honors, is precisely the case at bar. Lieutenant Price was discharged on surgeon's certificate of disability. (See record, p. 5, and Att'y Gen's statement of facts in first brief, p. 1.)

True, the decision does not show whether Lieut. Fellmagle resigned, or whether his sickness was contracted in the service. But if the Comptroller had either of these points in mind, (which he seems not to have had,) he gave the officer the benefit of the presumption that both were favorable. It would be interesting to know all the facts in Fellmagle's

case, for they would most likely be found parallel to the case at bar.

He was an officer of the army during the Mexican war, but whether a volunteer or regular officer does not appear; and I have been unable to find the papers in his case.

So far, however, as the decision shows, it is favorable to the case before you, and, so far from establishing usage against our recovery, it establishes usage in favor of the defendant.

In this same vol. 12 I find cited by the Digest a decision found p. 273 of Digest, ¶ 2184, but the citation is wrong, and I failed to find the full text. The digested decision explains itself.

The Digest, p. 282, ¶ 2182, cites a decision in vol. 13, p. 11; but on careful search I do not find it. The decision is plain from a reading of the Digest.

The Digest, p. 282, ¶ 2178, cites vol. 14, p. 35. I find nothing in the decision beyond the abstract.

The court will perceive that the general principle is here announced that a soldier, when honorably discharged, is allowed the travel-pay.

I read also from the Digest, p. 283, ¶ 2185, citing a decision in vol. 14, p. 228. I find on examining the text nothing beyond the abstract that is pertinent here. The reason given for not paying travel-pay under the first enlistment was that the soldiers were not discharged, but re-enlisted. And it will appear, by subsequent decisions, that a soldier discharged and immediately thereafter enlisting was paid travel-pay although he did not return home, and this on the ground that the travel-pay promised is a part of the contract of enlistment, and becomes due at once upon discharge.

Volume 14, p. 308, (Digest, p. 377, ¶ 2139,) gives the following:

MAY 26, 1851.

P. CLAYTON, Esq.,
Second Auditor.

SIR: I return herewith the papers connected with the claim of Major William H. Russell, late of the California battalion of mounted volunteers, for traveling pay from Los

Angeles, California, to Fulton, Missouri, disallowed by you on the 15th ult., and appealed by the claimant to this office.

I concur in your decision. Without conceding any other question arising on the papers, I am of opinion that the residence of Major Russell, within the meaning of the 15th section of the act of Congress of January 29, 1813, must be considered as having been in California, and not in Missouri. The object of that section was to provide an indemnity to the officer and soldier against any expense to which he might be put by being discharged from service at a place different from that at which he entered it. The word residence has always been understood to be the place of enlistment. * *

HILAND HALL,
Comptroller.

I am giving all that I could find, not because it bears upon the case necessarily, but that the court may have no doubt that the digested cases might contain something that they would wish to see and that is not given.

In this case Major Russell lived in Fulton, Missouri, and enlisted in California, but he was not allowed travel-pay to his home; and yet I will show further along that the rule here laid down was varied from in the cases of two or more Massachusetts regiments made up from enlistments in California, where travel-pay to California was allowed. See volume 28, p. 516–327, cited in Dig., p. 278, ¶ 2147.

Volume 15, p. 127 contains a decision.

On reading the text I find nothing in it but a decision as to the route by which the distance should be computed.

Volume 16, p. 109, gives a decision, but it was only as to place of residence.

Volume 16, p. 113, gives another, but nothing touching this case is decided.

Volume 16, p. 545, (Digest, p. 284, ¶ 2194,) I find nothing not contained in the Digest. This decision is similar to one already cited, which I will show hereafter is contradicted.

Volume 16, p. 73, is also as to route of travel.

Volume 17, p. 168, (Digest, p. 275, ¶ 2124,) gives a decision which is as follows:

APRIL 28, 1854.

P. CLAYTON, Esq.,
Second Auditor.

SIR: I return herewith the papers relating to the claim of Captain Isaac D. Toll, for travel-pay, &c., on his discharge from service, which were referred by you to this office on the 26th instant.

Captain Toll admits he was furnished with transportation at the Government expense from the city of Mexico to New Orleans, he being then on furlough. By the regulations of the army no officer on furlough or leave of absence is entitled to transportation in kind or by commutation. Under former decisions of this office Captain Toll is entitled to travel-pay from the place where he rightfully was when his discharge took effect to his residence, but the distance for which transportation had been furnished him in kind must be deducted, which would probably leave him a debtor to the United States.

J. M. BRODHEAD,
Comptroller.

This decision was cited from the Digest in a former brief as in point, so far as anything in it appears. I still think so. We cannot tell from the decision whether Captain Toll resigned or not. The principle of right to travel-pay is distinctly stated, and it was recognizing the latter part of the decision (which by the way I think erroneous) that our petition claims only from New York city, where the Government took our client on his way home after his discharge at Savannah.

Volume 17, p. 201, (Digest, p. 274, ¶ 2112,) is the case of an officer claiming mileage while traveling under orders, and it is held that mileage is for reimbursement, not emolument, a distinction which we shall notice again.

Volume 18, p. 184, (Digest, p. 283, ¶ 2189,) gives the following:

APRIL 28, 1855.

P. CLAYTON, Esq.,
Second Auditor.

SIR: The principle in the case of Bridges, submitted by you, presenting the question of a right to mileage, (or travel allowances,) &c., to soldiers discharged at their own request before the expiration of their term of enlistment, was sub-

stantiably decided by Comptroller Thornton, on the 7th of April, 1832, in a letter to the Paymaster General, of which a copy was sent to the second Auditor. In that letter he said: "I am of opinion that soldiers so discharged from the army are not entitled to traveling-pay or rations from the place of discharge to their place of residence, because such discharges are never granted but at the request of the soldiers and for their own pleasure and convenience."

The soldier, under such circumstances, asks and obtains a release from his contract of enlistment; and the other party, the United States, in assenting must be held to be released from any correlative obligation to him.

If a soldier, who is discharged at his own request, not in consequence of sickness, but for his own convenience, can receive traveling-pay to his residence, the process might be repeated with a recruit enlisted in his place, and so on, to the pecuniary detriment of the United States. Such a policy is not legal or equitable, and cannot be sanctioned.

The retained pay can be paid him up to the period of an honorable discharge at any time, as that has been earned by the soldier.

In the particular case of Bridges, the documents from the Adjutant General's Office, which I send herewith, show that he was certainly discharged under circumstances that would forbid any allowance of traveling-pay. The papers referred by you are herewith returned.

J. M. BRODHEAD,
Comptroller.

Here we have for the first time the question given and the reasons for the decision. This was in 1855, certainly not an ancient period. If there were any rule well known, it is remarkable that the very officer who was in position to know it, viz, the Second Auditor, was ignorant of it. We must presume that the Auditor knew the records in his own office and was familiar with Comptroller Thornton's decision of 1832, but he did not regard it as determining any principle, as we have shown it did not. It was a special case, as the one here is; and the reasons governing it were doubtless entirely outside the precise point in the case then before him or the one at bar.

It is not my purpose, in giving the various decisions, to

argue the points fully, but I must remark a word upon this decision of Comptroller Brodhead.

You observe that he makes a distinction between the soldier leaving the service at his own request in a healthy condition and one leaving at his own request "in consequence of sickness." Where does he find warrant of law for this? Section 15, act January 29, 1813, (2 Stats., 794,) makes but one distinction, and that is where the officer or soldier is discharged by way of punishment for an offense.

And this distinction runs through subsequent decisions. Suppose two cases of the kind just put were before your honors, could you, by judicial construction of the law, pay the one and deny the other? And if you paid one because he grew sick in the service or was wounded, on grounds of humanity and equity, what would you say if he asked to return home discharged because his wife or child was dying or his property going to decay; or that the military discipline to which he was subjcted was cruel and unbearable, or that the war in which he was engaging was an unholy one, and against humanity; or, in short, when you depart from the letter of the law and consult your feelings, where would end the good excuses for asking to quit the service which you would approve?

Turn to the law. It reads, "Whenever any officer or soldier shall be discharged from the service, except by way of punishment for an offense, he shall be allowed his pay," &c.

It is much safer and far wiser to follow the law than to inject into it an elastic quality which shall obey the caprices of men's feelings and notions of equity.

The Comptroller says, the soldier who asks and obtains a release from his contract of enlistment thus releases the Government "from any correlative obligation to him."

See how inaccurately this opinion deals in assertion of principles. The soldier, by asking a release, absolves the Government "from *any* obligation." And yet the opinion directs that at least one obligation should be kept, namely, paying the soldier his retained pay.

The Government was under no obligation to keep him

if it chose to discharge him. Correlation means reciprocity: something in return for something. Did the soldier enlist with the understanding that the Government was conferring upon him a boon, which could only be reciprocated by the correlative boon of surrendering a part of his pay?

I must ask pardon of the court for pointing out more distinctly the inconsistency, to say the least of it, so glaring in the opinion.

He says the soldier must be paid his retained pay. Why? Because he has earned it, says the Comptroller. *Non constat*, he may have been a very worthless soldier. The true reason is, because the law awards it to him in as plain, but no plainer, language as it awards him travel-pay. Who can say that the correlative obligation absolved is not the obligation to pay "retained pay," instead of travel-pay? Congress has not told us which is meant, or that either is meant to be absolved.

The Comptroller suggests that, if a soldier is discharged at his own request, except for sickness, the recruit who fills his place might also repeat the request, and so on, to the pecuniary detriment of the Government. (See The United States *v.* Dickson, 15 Pet., pp. 163, 164.) Would it, I ask, be any the less to the detriment of the Government if he requests to be discharged from sickness? Certainly not, and yet this exception is made. But the Government need suffer no detriment, if it choose not to. It may keep the soldier or not, as it may decide. The soldier's request is nothing. He cannot quit the Government service as a laborer may quit his employer. If he should, he is punished as a deserter; and in time of war the sentence may be death.

But we are dealing with precedents and rulings, which are sought to be dignified into usage, so as to overthrow the law. Notice, then, that this decision speaks of no immemorial usage, no ancient, well-known, and definite rule of construction. It falls back upon one decision, given in 1832, unknown even to the Auditor, and a decision that was made in a particlar case, which was controlled by its own facts, and these facts not now to be learned at all.

Further, the decision now being considered also rests upon facts not shown in it, and, for aught we can tell, controlling it. The Comptroller says: "In the particular case of Bridges" (which is the case decided in 1855) "the documents from the Adjutant General's office show that he was certainly discharged under circumstances which would forbid any allowance of travel-pay." I think it not improbable that there may have been some punishment in the discharge. I say, therefore, that up to this point of time there is absolutely nothing to guide us in an endeavor to establish any certain rule which could govern all cases. We are thus brought down to a period but six years before the rebellion, against which this defendant fought.

Volume 18, p. 361, (Digest 283, ¶ 2191,) gives a decision which is fully shown in the Digest, to the effect that a soldier receiving and accepting a commission is not entitled to travel-pay as a soldier. The reason for this is, that the soldier is not discharged, otherwise it would conflict with the universal rule which gives the soldier travel-pay on being discharged, although he enlist again at once.

Volume 19, p. 220, (Digest, p. 274, ¶ 2115,) a decision is recorded, but it is only to the effect that mileage of an officer traveling under orders is reimbursement, and not emolument. Reference is made to an elaborate opinion of Attorney General Clifford, of 30th September, 1847, not printed in the Opinions.

In the same volume (pp. 220 and 248) decisions to the same effect, and nothing further on the question of travel-pay.

In volume 20 I find no decisions on travel-pay, nor in volume 21.

Volume 22, p. 410, I find the following in a letter dated July 16, 1860, to T. J. D. Fuller, Second Auditor.

This was a case of Surgeon J. M. Sterner, of the United States army.

On the 6th September, 1853, he, being then in active service, was arrested in Texas by civil authority on a criminal charge, and on June 16, 1855, was tried and acquitted. He did not report for duty, and on May 9, 1856, he was dropped

from the rolls of the army by the President of the United States, he "having for a long time absented himself from his station without leave." In 1860, Doctor S. claimed pay, &c., and travel-pay, and the Comptroller decided that he should be paid pay and travel allowance, but not any pay after his acquittal in Texas, as he failed to report for duty.

Here, your honors, is a case where an officer was really a deserter. He had absented himself for a year, and was punished in the only way he could be without having his person under arrest, by dropping him from the rolls, which was a dismissal disgraceful to him, and yet he turns up in Washington four years after his dismissal, and draws his army pay up to the time he was acquitted by civil court, and is also paid travel-pay from heaven knows what point.

This case came within the only exception named in the law, viz, discharged as punishment for an offense. The officer sought the most disgraceful way he could to obtain a discharge. He was not even *formally discharged*, but only dropped from the rolls, and yet he was paid what is now sought to be denied this defendant, who was honorably discharged upon his request, which the Government could have denied if it had chosen to do so.

Do not your honors perceive how far the rulings have been from being uniform?

The few decisions we have been able to discover are made for particular cases, and were governed by circumstances peculiar to each case. In this surgeon's case, so far as the facts found in the decision show it, (and I have given all,) I think the Comptroller might well have refused travel-pay under the clause I have mentioned; but we find him ignoring the only exception Congress has put into the law, and inserting others not there, and never intended to be put there.

Volumes 23 and 24 I find to contain nothing pertinent to this case.

Volume 24 brings us into the year 1863, far removed from the mythical authority which has been floating in credulous brains.

So far as any question of long usage is concerned we

might here stop, but I started out to exhaust the departmental decisions, and I shall continue a little longer to examine them.

Volume 25, p. 239, (cited in Digest, p. 283, ¶ 2188,) contains the following:

JULY 7, 1863.

A soldier honorably discharged has a right under the law to an immediate payment of his pay and rations, or an equivalent in money, for such term of time as shall be sufficient for him to travel from the place of discharge to the place of his residence, computing at the rate of twenty miles to a day.

It is a part of his contract of enlistment, and must be paid; nor is he under any obligations to perform the travel if he shall choose to re-enlist or to stay where he may be when discharged. The Government has fulfilled its obligation when it has paid him, and the soldier is not responsible to Government for the use he may make of his money. * * *

J. M. BRODHEAD,
Comptroller.

TO THE PAYMASTER GENERAL.

See also Digest p. 282, ¶ 2182.

Here is a decision which reads something like a judicial opinion. I quote chiefly to show that travel-pay is regarded as a part of the promise embraced in the contract of enlistment; that it is a part of the pay of a soldier; that, like bounty promised on discharge, it must be paid as part of the contract. Is the contract broken by asking to be discharged from service?

Page 292 of this volume (cited Digest, 277, ¶ 2140) I have examined, but it is not in point; and one on page 587, (Digest, 277, ¶ 2143,) on mileage while traveling under orders, and not pertinent.

On pages 498, 499, (Digest 270, ¶ 2075,) is the case of Lieutenant Vredarberg, of fifth Iowa cavalry, who was a prisoner, and was mustered out on reaching Washington. Paymaster Dodge wanted to know from what point and to what point he should be paid travel-pay. The Comptroller replies:

"Every officer and enlisted men is entitled under the 15th section, act January 29, 1813, to one day's pay and rations

pose of getting travel-pay. Our army was not made of such soldiers. Mercenary wretches like this suppositious one cannot unmake law. Besides, what I insist here and elsewhere before you during this argument, no officer or soldier had the power to resign. No one ever left the army except as a deserter or by sentence of court-martial, or by death, who was not discharged by the Government's own motion. The resignation may lead to a discharge, but it is not and cannot be discharge.

As touching these extreme cases supposed by the Comptroller of successive resignations and the like, I desire to read from opinion of Mr. Justice Story in United States *v.* Dickson, 15 Pet., pp. 163, 164. The case in many particulars is strikingly in point.

But I must hasten through these decisions.

In this same volume 27, p. 447, (cited in Digest, p. 270, ¶ 2078,) I find nothing but that which appears in the Digest. It appears to have been an indorsement on some paper, but is not directed to any one. It is dated February 4, 1865, signed J. M. Brodhead, and is as follows:

"As a general rule, an officer who voluntarily quits the service is not entitled to travel-pay home; but where his resignation and consequent honorable discharge are in consequence of wounds or disability incurred in the line of duty it is sometimes allowed as an exception and by special decision."

This decision is cited by the Attorney General and myself in our first briefs. But it is of no value to show usage in this case, for it was given a month after my client was discharged the service.

I said before, and I repeat, that this decision alone shakes the whole superstructure based upon usage. The claim put forth by the Attorney General is, that the practice has been uniform to deny resigned officers travel-pay. Here we see an exception, and that overthrows the whole theory. There is not to be found an unqualified decision to the extent claimed by the Attorney General. We have discovered but

few of any kind, and they of recent date, but they are all *Protean*, and change to suit the case.

In this volume (p. 305) I find a decision as to the place to which travel-pay should be given. (Digest, ¶ 2144.)

The Comptroller shows here that it is the place of *enrollment* and not *residence*, stating that as to *soldiers* the 5th section (act July 22, 1861) changes the law of 1813, and G. O. No. 43, War Department, July 10, 1861, changes it as to *officers*, the language being place of *enrollment* in both.

I cite this to show for the first time the mention of G. O. 43 of 1861, under which we claim as well as the law, and to show the Comptroller's recognition of the order.

Volume 28, pp. 312–313 (cited in Digest, ¶ 2146) contains a decision to which I invite attention. It is the case of Lieutenant Colonel West, first California volunteers, who resigned his commission to accept commission as brigadier general; and Paymaster Eaton submitted the question to the Comptroller whether this disqualified him from having travel-pay on final muster-out. The Comptroller held it did not. The opinion concludes as follows: "His service in respect to travel must be considered as continuous, and he will be entitled to his travel-pay to San Francisco, his residence and place of original enrollment."

Colonel West was serving in New Mexico when he resigned, and was commissioned as brigadier general. Here was a resignation for what might be regarded the benefit of the officer. If the rule applied in some cases were uniform in all, the correlative obligation of Government, which we have heard about in a prior case, to pay travel allowance, was discharged; and General West, on final muster-out, if he did not resign, should be paid travel-pay to New Mexico, the place of *enrollment*, as brigadier general. I find on inquiry at the War Office that he was finally mustered out at his own request. But he was paid travel allowance to California under his first enlistment.

I find nothing further pertinent in this volume until p. 633, (cited in Digest ¶ 2079.) This decision was in the form of a letter of January 12, 1866, to *Senator Ramsey*, who in-

quired as to the bounty of the soldier, and incidentally the following is mentioned in the letter:

"It has been the established rule of the service for more than thirty years not to allow travel-pay to men and officers discharged at their own request *before the termination of the period of their enlistment.*"

It will be seen that the Comptroller here makes an exception not mentioned previously anywhere in favor of those who do not resign before the term of their enlistment. The rule laid down by the Attorney General as uniform, then, by his own witness is shown to have varied in behalf of officers who resign on account of disability, and now another, where the officer or soldier serves out his time of enlistment. What other variations have been made to this rule I cannot say, but here are enough to destroy its uniformity.

But this is not all. The Comptroller here for the first time alludes to the established rule as a rule, and he dates back only thirty years, which goes to 1836, and I have given you the basis of his statement as to the established rule, which was a particular case peculiar to itself.

Volume 29, p. 32, (cited in Digest, p. 276, ¶ 2129,) I find gives nothing beyond the abstract.

Same volume, 104, I find the case of a soldier, J. W. Palmer, who was discharged with a view to re-enlist in the general service. The Comptroller tells him such discharges have always been looked upon as transfers simply, and he is denied travel-pay. I give this to show its conflict with cases already cited, establishing the right of the soldier on discharge to the pay as part of contract.

In this volume, p. 623, (Digest 271, ¶ 2088–89,) I find a decision to which I invite attention.

Assistant Surgeon Wood, 8th regiment California volunteers, was discharged at Fort McGarry, Nevada, and was entitled to travel-pay. It seems that the Government had transportation for the regiment, but Surgeon Woods chose to remain at the post and take a contract as surgeon for the post; and the question was as to the effect of his refusing to avail himself of Government transportation. The Comp-

troller decided that if the Government did not offer him transportation he is entitled to travel-pay, but if transportation was provided, "and he saw fit not to avail himself of it and remained at the post solely for his own benefit, then he is not entitled to it." But he graciously adds, "if he remained for the good of the service at the post, his refusal to accept transportation in kind ought not to forfeit his travel-pay."

I give this as showing some new feature imported into the law, and to illustrate how the decisions vary. We have already seen that the Comptroller holds the travel-pay due on discharge, no matter whether the officer goes home or not. We now find him compelling the officer not only to go home, but to go in Government wagons. Further, the officer may remain at the post for the good of the service, but not his own.

Volume 30 gives nothing but a decision as to mileage to officers under orders.

Volume 31, p. 669, is the case of Captain John B. Campbell, assistant quartermaster, who entered the service in Lexington, Kentucky, and was mustered out January 26, 1866, at Camp Collins, Colorado Territory. On reaching St. Louis, being pressed for money, Major Woods, assistant quartermaster, paid him the amount of his expenses, ($165,) under the provisions of the 15th section of the act of January 29, 1813, "that whenever any officer or soldier shall be discharged, except as punishment for an offense, &c., * * * he claimed the difference between that sum and the $165.

The Comptroller indorsed, November 29, 1868, "I think he is entitled." He was entitled whenever discharged to travel-pay, and the fact that he has received a part of what he was entitled to does not bar his right to the balance.

I give this to show that it is not reimbursement, but pay, that the law gives. The travel-pay from Camp Collins to St. Louis would be much more than $165, probably, but his expenses were not to be considered. The law governed.

In volume 31 (p. 461) I find the following:

JULY 10, 1868.

SIR: Your letter of the 8th instant received. You say, "a soldier tried for an offense is sentenced to confinement with or without hard labor for a specified time, which extends beyond his enlistment." And you ask, "is he entitled to an honorable discharge, and whether or not is he entitled to the usual travel-pay under act of January 29, 1313, section 15?" In reply, I have to say, that the War Department decides whether the man shall have an honorable discharge.

It has always been my opinion that a soldier dishonorably discharged at any time, was *so* discharged by way of punishment for an offense, and therefore not entitled to travel-pay under the act. But the War Department held differently, after at first agreeing with me, and the rule was modified. The Comptroller then concludes that the soldier must be paid.

This case is not unlike the officer imprisoned in Texas, and dropped from the rolls for absence without leave. In the case here there seems to have been no discharge even, but the soldier got his travel-pay. The case shows the instability of the decisions, and illustrates the wrong in giving the Departments power to twist the law for individual cases.

I have thus run over all the decisions of the Comptroller which I thought in any way bearing upon the case. They present a heterogeneous mass of opinions, apparently made with little regard each to the other.

THE USAGE MUST BE WELL KNOWN.

It does seem to me, your honors, that the knowledge one would obtain upon examination of these volumes is not that knowledge one must have before he can be said to have forfeited any rights under the plea of well-known usage presented here. The Digest is a still more uncertain guide. But neither of these sources of knowledge can be said to have been so notorious as to warrant a presumption of knowledge on the part of an officer enlisting in the State of Iowa.

THE USAGE OR CONSTRUCTION MUST BE DEFINITE.

I have endeavored also to show, in passing along, the indefiniteness of the decisions, and I think it fully appears, from the opinions prior to the rebellion, that they pertained to individual cases, and were not announced as general rules, and were never referred to as establishing general rules. Besides, it is not possible to derive a rule from them. The opinions of Comptroller Thornton, in 1832, and of Comptroller Brodhead in 1855, were given upon cases peculiar to themselves, and upon facts not fully stated, but from which the presumption is plain that the cases did not rest upon the simple proposition of leaving the service at their own request. Not one of the decisions which I have been able to find does rest upon this proposition exclusively, and this, it must be borne in mind, is the theory the Attorney General seeks to establish. How then can you say this defendant is concluded in his rights upon the theory of his having knowledge of a definite construction, when he did not know anything about it, and when, if he had inquired before entering the service, he could have learned nothing definite?

UNIFORMITY.

But this is not all. The construction or usage must have been uniform. Uniform as to what, I ask? Clearly the rule is, that it should have been always the same as regards officers resigning. Was it so? We have seen that it was not. We find:

1. That certain cases of officers and soldiers leaving the army at their own request were denied travel-pay; but those cases were peculiar.

2. That a distinction is made, and a departure from the so-called uniform rule in favor of officers who tender resignation based upon surgeon's certificate of disability, or who request to leave the service on account of wounds or disease contracted in the service, and this last may be shown otherwise than by surgeon's certificate.

3. That officers or soldiers who serve out their term of en-

listment may ask a discharge without forfeiture of travel-pay.

It seems to me, your honors, that the departures from the rule, as claimed here to be uniform, overthrow the claim of uniformity utterly. Conceding knowledge of the department rulings—conceding their definiteness—and what have we? An officer resigning on surgeon's certificate of disability, with not only the law promising him travel-pay, but with a ruling directly to meet his case.

Can there be doubt of the right of the defendant to recover? Will my learned friend dispute it?

USAGE OR CONSTRUCTION MUST BE ANCIENT, OR OF LONG STANDING.

Another requisite of the rule as to usage is its antiquity or long standing. What are the facts here? If we admit that the decisions I have given were known to defendant, (which cannot be done without admitting an absurdity,) he would still have the right to contest the rule, unless it had been long settled and acquiesced in, so as to make the rule a part of the statute. Now, the first decision to the point to be found in the public records of the Comptroller was made in 1832, and that decision was, as I have shown, a special one. Can this be enough to make law? Will this court virtually amend a law, on the strength of an erroneous ruling of thirty years' standing, made by an accounting officer in a particular case? If that very case were to come up, it might be upheld on its own facts. But are claims not like it, occurring subsequently, to be overthrown upon that as a precedent? Certainly not.

The next decision to the point, and coming nearer laying down a rule, is the decision of 1855, but six years before the rebellion, and less than seven before the defendant entered service. Can this support long usage? Certainly not.

All other decisions to be found in the Comptroller's records were made during the war, and can have nothing whatever to do with the question of usage or construction. As to the earlier decisions, whatever of acquiescence there may be in

them, it grew out of there being no other remedy—nothing to do but submit. And this destroys all its force. Besides, only the particular persons denied the allowance acquiesced.

OTHER CASES CONSIDERED.

But, your honors, I have now to invite your attention to particular cases which I have discovered outside of the Comptroller's office. If anything were wanting to overthrow this whole theory of uniform, well-known, definite, and long-established usage, I think what I shall now show you will furnish it.

"WAR DEPARTMENT,
"ADJUTANT GENERAL'S OFFICE,
"WASHINGTON, D. C., *September* 5, 1870.

"Special Order No. 233.

"¶ 2. At his own request, under the provisions of the act of Congress approved July 15, 1870, sec. 3, First Lieutenant Gustave Von Blucher, ninth United States infantry, is, by direction of the President, hereby discharged the service of the United States.

"He is entitled to traveling allowances.

"Signed, &c."

Other special orders contain the same provisions as to various other officers.

This officer got travel-pay.

"Special Order 235, Sept. 6, 1870.

"¶ 5. At his own request, under the provisions of the act of Congress approved July 15, 1870, sec. 3, Second Lieutenant Benjamin F. Grafton, nineteenth United States infantry, is, by direction of the President, hereby honorably discharged the service of the United States, to take effect September 1, 1870.

"Signed, &c."

This officer did not get travel-pay, and there are many cases of this kind. Both of these officers were discharged while in Washington city. The residence of Grafton, who got no travel-pay, is in Texas. The residence of Von Blucher, who received it, is Harper's Ferry. Being discharged at Washington, he should have been paid travel allowance

from Washington to Harper's Ferry. But he was paid from Fort Kearney, Nebraska.

These cases are parallel, and yet one got travel-pay and the other did not.

I now give a case still more glaringly illustrative of the lack of uniformity in these cases. It is the case of Major Leet, lately of the staff of General Grant.

The order is as follows:

"Special Order No. 172, July 23, 1870.

"At his own request, under the provisions of the act of Congress approved July 15, 1870, section 3, Major George K. Leet, Assistant Adjutant General, is, by direction of the President, hereby honorably discharged the service of the United States, to date August 1, 1870. He will receive no final payments until he shall have satisfied the pay department that he is not indebted to the United States.

"Signed, &c."

This officer was paid travel-pay from Washington, D. C., to Chicago, forty-two days, at $229 17 per month, $320 83.

Major Leet's order said nothing about travel pay, and yet he got it.

"Special Order 369, Dec. 2, 1870.

"¶ 6. At his own request, under the provisions of the act of Congress approved July 15, 1870, section 3,' First Lieutenant J. H. May, twelfth infantry, is, by sanction of the President, hereby honorably discharged, to take effect December 5, 1870.

"Signed, &c."

" Special Order 379, Dec. 28, 1870.

"¶ 2. So much of ¶ 6, Special Order No. 369, December 21, 1870, as honorably discharges the service of the United States, to take effect December 31, 1870, First Lieutenant James H. May, twelfth infantry, is hereby so amended as to entitle him to traveling allowances.

"Signed, &c."

There is the case of an officer at first discharged in such form as to get neither travel-pay nor mileage, (yet see Leet's case,) and his order was afterwards amended to give him travel allowances.

"Special Orders No. 353, Dec. 10, 1870.

"At their own request, under the provisions of the act of Congress approved July 15, 1870, section 3, the following named officers, by direction of the President, are hereby honorably discharged the service of the United States:

"First Lieutenant J. W. Thomas, third infantry.

"First Lieutenant J. W. Dickenson, unassigned.

"They are entitled to traveling allowances.

"Signed, &c."

"Special Orders 357, Dec. 13, 1870.

"So much of ¶ 3, Special Order 353, December 10, 1870, as authorizes traveling allowances to First Lieutenant J. W. Dickenson, unassigned, is hereby amended, so as to entitle him to ten cents per mile from his station to his home.

"Signed, &c."

By this order one of the officers discharged by Special Order 353 was first designated as entitled to travel-pay, but the order was amended to give him mileage.

There are others of this class which illustrate the absence of uniformity with regard to travel-pay.

The converse of this last peculiarity is seen in the following:

"Special Orders 381, Dec. 29, 1870.

"¶ 2. So much of Special Order 240, ¶ 5, from the Adjutant General's Office, dated September 10, 1870, discharging, upon his own request, First Lieutenant Frederick A. Batty, unassigned, as provides that he should be allowed ten cents per mile in proceeding from his station to his home, is hereby revoked, and he will receive traveling allowances instead.

"Signed, &c."

Thomas and Dickenson were first given traveling allowance, but for some unknown reason Dickenson was afterwards given mileage. Mileage and travel-pay never can amount to precisely the same sum. The travel-pay always amounts to more than mileage. We have here, then, a discrimination in the discharge, giving travel-pay to two officers resigning, under precisely similar circumstances, one getting more than the other. And in the case just given of Batty, his order was

changed after he was discharged and out of the service, as also in the case of Dickinson. In giving Dickenson mileage there was no authority, for an officer can receive no orders to travel when out of service, and the law gives no mileage, except for traveling under orders.

"Special Order 361, Dec. 15, 1870.

"¶ 10. The resignation of First Lieutenant James B. Cole, Fourth cavalry, has been accepted by the President, to take effect December 13, 1370.

"Signed, &c."

Under departmental rulings this officer gets neither travel-pay nor allowances, nor years pay and allowances. Yet he resigns at the same time, and under similar circumstances, and under the operation of the same law as those first named.

"Special Orders No. 345, Dec. 6, 1870.

"¶ 2. At his own request, under provisions of the act of Congress approved July 15, 1870, section 3, First Lieutenant George W. Smith, unassigned, is, by direction of the President, hereby honorably discharged the service of the United States, to take effect December 15, 1870. He will be allowed, under section 24 of the act of Congress approved July 15, 1870, ten cents per mile in proceeding from his station to his residence.

"Signed, &c."

Other special orders contain the same provisions as to these officers. Under this form they got mileage instead of travel-pay.

"Special orders No. 366, Dec. 19, 1870.

"By direction of the President, on the recommendation of the board convened under section 11 of the act of Congress approved July 16, 1870, Second Lieutenant Wm. L. Wann, Jr., 13th infantry, is hereby mustered out of the service for *cause other than* injuries incurred or disease contracted in the line of his duty."

This is the form of order usually given to officers discharged on the recommendation of the board provided for by the act July 15, 1870, section 11.

Officers thus discharged are held by the pay department as

not entitled to travel allowances, but by the Comptroller, as I am informed, are held to be entitled to travel allowances.

If they are not entitled to it, then those honorably discharged under same law, at their own request, who are not paid travel allowance, are put in the same category with this class.

If entitled, there is a manifest injustice in giving it to them as they go out of service under strong suspicion of misconduct and an implied taint upon their military record, while other officers going out under section 3 of the law, at their own request, without such suspicion or taint, do not get it.

The instances I have given are of officers of the army going out, at their own request, under the same law, and yet one gets travel-pay and another does not.

The mere stroke of a pen in the War Department executes the law that we are claiming under in one case, and in the other destroys that law; and this court is asked to uphold this inequitable and unlawful exercise of power.

Can there be anything found in the act of July 15, 1870, to authorize the department to change the rule as to travel-pay? We ask the Court to look at the provisions of the act.

Section 3 provides as follows:

"That the President be, and he is hereby, authorized, at his own discretion, honorably to discharge from the service of the United States officers of the army who may apply therefor on or before the 1st of January next; and such officers so discharged under the provisions of this act shall be entitled to receive, in addition to the pay and allowances due them at the date of their discharge, one year's pay and allowances."

1. The power here given the President, at his discretion, to discharge officers who apply therefor is no new authority. He could do so before, and this power is as old as the existence of the army. So, then, that branch of the section may be laid out of view.

2. Further, the provision that officers so discharged are entitled to receive the pay and allowances due at their discharge

is not new. This the officers were entitled to, under previous law, upon discharge.

3. The remaining promise, that they should also receive one year's pay and allowances, is the only portion of the law conferring something unknown to the law theretofore.

Now it will not be claimed that the phrase "one year's pay and allowances" includes travel-pay. The phrase means one year's pay and one year's allowances. Travel-pay was not included, because that is dependent upon circumstances that vary the amount. We could not speak accurately of one year's travel-pay, but we can of one year's "allowances," as embracing a part of the officer's yearly salary. Travel-pay, furthermore, was due at the date of discharge, and could not be embraced in the phrase, "year's pay," &c. This is the view of the department, and for this reason, when it is thought desirable to pay the traveling allowance, the order says the officer is entitled to it, and this is always mentioned separately from the phrase "one year's pay and allowances."

Where, then, is the authority thus used of discriminating between officers similarly discharged? The law under which travel-pay is paid is the same and has remained the same for many years. The radical error in the whole system heretofore has been that there was no power to correct arbitrary action of the department. Its edict was law. Now that we have a tribunal to which to appeal, we are confronted with the theory that departmental construction is the supreme law of the land.

I call attention again and here to the fact that Congress used the word discharge in the same sense it was used in 1813; and further, there is a strong implication to be derived, from the connection in which it was used: that the matter of resignation or leaving at the officer's request does not change the effect of a discharge.

The only difference between going out of service under this act on resignation and going out by resignation before the act passed is in the promise of one year's pay and allowances. The question of travel-pay is unaffected by it. But the court will perceive how unequally it is administered.

I have obtained more information upon the rulings under this law, because there are scores of officers in the city affected by them who have given me the facts. I do not doubt that if the whole truth were known it would be found that scores and hundreds of officers who resigned in former years got travel-pay.

TWO PARALLEL CASES COMPARED.

Since the court ordered this reargument, an officer now in the city, being attracted to the matter, came to me to state his case. He was paid travel-pay on resignation. I read the order discharging him and indorsement on it:

"HEADQUARTERS THIRD ARMY CORPS,
"*December* 22, 1863.

"Special Orders No. 214.

[Extract.]

"5. * * * The following-named officer, having tendered his resignation, is honorably discharged from the military service of the United States on surgeon's certificate of disability:

"Capt Jno. G. Auld, fourth Maine vols.

"By command Major Genl. French.

"Signed, A. H. HART,
"*Assistant Adjutant General.*"

Paymaster's Certificate.

"Certificate No. 423,736.

"Paid $112, travel-pay and subsistence."

This officer obtained a discharge, based on "surgeon's certificate of disability," more than a year before the defendant was discharged. The defendant was discharged by order in almost the same language, and as the findings show "based on surgeon's certificate of disability." I read to your honors Price's ~~certificate of disability~~: discharge.

From 3.

"HEADQUARTERS DEPARTMENT
"AND ARMY OF THE TENNESSEE,
"SAVANNAH, GA., *January* 6, 1865.

"Special Orders No. 6.

[Extract.]

"¶ 3. The following-named officer, having tendered his resignation, *based on surgeon's certificate of disability, approved*

by the medical director, is honorably discharged from the military service of the United States, with condition that he shall receive no final payments until he shall have satisfied the pay department that he is not indebted to the Government.

"Joseph W. Price, 1st lieutenant and regimental quartermaster 39th Iowa infantry.

"By command of Maj. Gen. O. O. Howard.

"Signed, SAM'L L. TAGGART,
"Assistant Adjutant General."

If my learned friend says this class of officers should be paid, and that Captain Auld was properly paid, (as I understand he admits,) how can he ask your honors to reverse the judgment in this case. We were denied payment in the department, we sued in the court, and the case is here properly on appeal of the Government, which still resists payment.

Is there any reason why we should be sent away without redress?

Your honors, if I had the facilities my learned friend has; if I could employ the clerks of the department to overhaul the files for individual cases; if I had the privilege of doing so myself; if the accounting officers were as ready to assist in developing all the facts as they are to defeat this suit at all hazards:—I could show your honors hundreds of similar rulings on both sides of the question.

There is one other particular case placed in the hands of the firm of which I am a member to which I ask attention here as further illustrating departmental action.

Major Stubbs, of the eighth Iowa volunteers was mustered out "on expiration of term of service," by the military authorities, to take effect September 19, 1864, the date his regiment was mustered out. (United States Army Register, vol. VII, p. 257.) He was kept in service, however, on detached duty, until November 14, 1865. On application to settle his accounts and collect his back pay, including a portion of his year's service, it became necessary for him to have the original muster corrected, so as to show the date he actually left the service. He applied to the War Department for the necessary order some time in 1868, whereupon the following order issued:

"WAR DEPARTMENT,
"ADJUTANT GENERAL'S OFFICE,
"WASHINGTON, *April* 24, 1868.

"Special Orders, No. 44.

[Extract.]

"1. The muster-out and discharge of Major William Stubbs, eighth Iowa volunteers, as made to date September 19, 1864, is hereby revoked, and at his own request he is honorably discharged, to date November 14, 1865, he having rendered service with a proper command to the latter date.

"He will receive no final payments until he shall have satisfied the pay department that he is not indebted to the Government.

"By order of the Secretary of War.

"Official: E. D. TOWNSEND,
"*Assistant Adjutant General.*

"Major WILLIAM STUBBS,
"*Through General Vincent.*"

Indorsed on the back—

"P. M. G. O., D. R. C., *June* 25, '68.

"Paid in full $271 16. Having been discharged at his own request, is not entitled to travel-pay.

"H. P. WOLCOTT,
"*Paymaster, U. S. A.*"

Major Stubbs then addressed us the following letter:

"CHICAGO, *July* 13, 1868.

"Messrs. CHIPMAN, HOSMER & Co.

"GENTLEMEN: I have the honor to acknowledge receipt of draft for $212 61, and inclose herewith discharge and application for travel-pay, as requested. I do not know why the pay department should refuse to pay me, as other officers of my command were mustered out under the same orders and collected their pay without any trouble. I think that you collected the account of Lieutenant Colonel W. B. Bell, of my regiment, who was mustered out under same orders, and only a short time previous, the only difference being that he was mustered by the chief mustering officer of the corps, and I by division. We were both mustered under provisions of Circular No. 75, dated Adjutant General's Office, Washington, D. C., September 22, 1864.

"I remain, gentlemen, yours,

"WM. STUBBS."

On his behalf we laid the case before the Auditor and Comptroller, and the War Department, but without success; and to show that the officers of Government did not err in ignorance of the facts, I read a copy of our letter to the Adjutant General.:

WASHINGTON, D. C., *January* 14, 1869.

To the ADJUTANT GENERAL, *U. S. A.*

GENERAL: We have the honor to submit letters from Second Auditor, rejecting claim of Major William Stubbs, Eighth Iowa infantry volunteers, for traveling allowances; and we respectfully ask that the order discharging Major Stubbs be so amended (if any amendment be thought necessary) as to allow him the amount claimed. The facts in the case are as follows:

Major Stubbs was retained in service after the muster-out of his regiment, but his discharge (being made as of the same date as the muster-out of regiment) failed to show such subsequent service. Major Stubbs therefore "requested" your office to issue an amended discharge recognizing that service, which discharge was issued May 1, 1868, and sent to us.

It thus appears that Major Stubbs not only remained on duty through his required term, but longer; that he did not resign; that he did not, while in service, request to be mustered out; and we think he is entitled to such traveling pay as other officers, honorably discharged at the pleasure of the Government, receive.

We think the Auditor's decision is founded on a wrong understanding of Special Order 44, Adjutant General's Office, April 24, 1868, which order, in our opinion, simply changes the date of Major Stubbs' previous discharge; on which previous discharge the Major would have been entitled to all that is now claimed.

Very respectfully, CHIPMAN, HOSMER & Co.

This application was denied.

Look a moment at this case. Major Stubbs had served a year longer than his regiment; he was formally, under general orders, mustered out with it, but retained longer in service by the Government, but finally was released from further service. After settling his accounts, at the end of two years and a half he finds he must get the first muster cor-

rected, in order to be paid his arrearages, and he asks to have it done; whereupon he finds himself choused out of his travel-pay, on the theory that he was "discharged at his own request;" whereas at the time this order issued he had been properly out of service over two years.

"2 *Clown.* But is this law?
1 *Clown.* Ah, marry is't; crowner's-quest law."

It is not possible to present a clearer case than this of vested right; but here again it was swept away by an arbitrary power.

Under such administration of the law, of what value to this court are departmental precedents and decisions? How can they be treated as judicial?

While noticing these cases I desire to call attention to a circular issued by the Paymaster General after the act of July, 1870, passed. It is Circular No. 73, of July 22, 1870, and issued to instruct paymasters. I quote:

"¶ VII. Officers honorably discharged from the army, including those who, by the conditions of this law, may be discharged on tender of resignation or otherwise, with one year's pay and allowances, are entitled to traveling pay to their homes as heretofore, one day's pay for every twenty miles of traveling, to be estimated on the salary basis, with the accrued ten per cent. increase, and by the shortest mail route."

In this paragraph the Paymaster General quotes from a letter of the Secretary of War on the subject, which we have been unable to procure, as follows:

"The Adjutant General, on the acceptance of the resignations of officers of the army, will, in all cases falling under the provisions of the act of Congress approved July 15, 1870, recite the fact of the resignation being accepted thereunder. If the act be not referred to in the special order accepting the resignation, or in the usual letter of notification, its provision as to the year's pay and allowances to resigned officers will not be received as applicable to the case."

The Paymaster General then concludes the paragraph as follows:

"Resignations not falling under this law, and not entitling to the one year's salary, cannot carry traveling allowances."

1. The Paymaster General first says, officers honorably discharged, including those tendering resignations under the act are entitled to travel-pay to their homes as heretofore, viz, one day's pay for every twenty miles, &c. But the fact is, some of the officers get it and some do not, and many of them deprived are now seeking redress, and look to the decision in this case to clear up the law of travel-pay.

The order practically is operative as to some and inoperative as to others, and unless the order of discharge bears on its face the statement that the officer is entitled to travel-pay or mileage, he gets neither, although the order recites the fact that the officer resigns under the act.

2. Notice the quotation from War Department letter. Two officers may resign at the same time: in one order of discharge the fact is recited that his resignation is accepted under the law, and he thereby gets a year's pay and allowances; in the other the fact is not recited, and he does not get the year's pay and allowances; and as to travel-pay, one one or both may get it, as suits the officer who issues the order of discharge.

3. The Paymaster General adds that resignations not entitling the officer to one year's salary cannot carry travel-pay.

But this depends upon the form of order, as we have seen. And if the resignation does entitle the officer to a year's salary, he does not always get travel-pay.

I know of no way to reconcile these conflicts but to follow the law, and the sooner it is understood that the law must govern, the sooner will we have a just administration of the law.

THE LAW OF USAGE AND CONTEMPORANEOUS CONSTRUCTION.

Much stress is laid upon the assumption that uniform construction and departmental usage have been against our theory of this case, and that this usage, and not the law, must now control.

The court must perceive the vast importance of such a proposition, if held to be sound in law. Practically, it erects the departments into judicial tribunals, and pronounces that hereafter no construction placed upon a law by the executive departments of the Government, when of long usage, can be disturbed by the courts. I cannot suppose this court to be ignorant of the manner in which those decisions are made, and knowing this, I am amazed that such a proposition should find lodgment in this high tribunal. It is questioned by some whether the decisions of the courts of last resort in the States should, on appeal to this court, be followed implicitly; but there are many weighty reasons why this should be so; not one of which can I conceive to be applicable to the case at bar. The gentlemen who administer the executive departments are not selected with reference to their learning in the law; their functions are not judicial, they are under none of the restraints which govern the judiciary; they are not courts.

This is no new view to this court. Whenever any claim or any account has been reviewed in this tribunal, your honors have pronounced the law of the case with respect for, but not obedience to, the decisions of departments.

Greeley *vs.* Thompson, 10 Howard, 234, 235.
Gratiot *vs.* United States, 4 Howard, 80.
United States *vs.* Eliason, 16 Peters, 291.
United States *vs.* Gillmore, 8 Wallace, 330.

The regulations of a department of the Government in settling its accounts form general rules for the transaction of its business, but are subject to revision by a court and jury when they work manifest injustice to individuals.

United States *vs.* McCall, Gilpin, 563, 577.
United States *vs.* Duvall, Gilpin, 372; *Ibid*, 357.
Pierce *vs.* United 1 N. & H., 270.

"The orders as well as opinions of the head of the Treasury Department expressed, in either letters or circulars, are entitled to much respect and will always be duly weighed by

this court; but it is the laws which are to govern rather than their opinions of them."

Greeley *vs.* Thompson, *et al.*, 10 Howard, 234, 235.
Marriot *vs.* Burns, 9 Howard, 634, 635.
United States *vs.* Dickson, 15 Peters, 141.
United States *vs.* Lytle, 5 McLean, 9.

"The accounting officers of the Treasury cannot superadd a condition not required by the act of Congress, which is supreme in matters of legislation. Departmental regulations must be in subordination to the law of Congress."

Court of Claims 1865–6, Magruder *vs.* The United States, Dev., 21.

2. If the Government relies upon usage or custom, it must prove it clearly and unmistakably, and the burden of proof of[illegible] rnment, and not upon the defendant.

cl[illegible] l rule," says Mr. Justice Clifford, in Oelricks u[illegible] 3 Howard, 63,) "there must be ambiguity or uncertainty upon the face of the written instrument, arising out of the terms used by the parties, in order to justify the extraneous evidence; and, when admissible, it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add to or engraft upon the contract new stipulations, nor to contradict those which are plain." He cites 2 Kent Com., p. 556; 3 *Ibid*, p. 260, and note; 1 Greenleaf's Ev., sec. 295; 2 Cranch & J., 249, 250; 14 Howard, 445.

Evidence of usage is never admissible to oppose or alter a general principle or rule of law, so as upon a given state of facts to make the legal rights and liabilities of parties other than they are by law. (19 Wend., 252; 6 Metc., 393; 6 Pick., 131; 6 Binn., 416.)

A custom is only obligatory upon the parties when the law does not provide for the case. (The Lucy Ann, 23 Law Reports, 545.)

Custom cannot modify a statute. (The Forrester, Newb., 81; Renner *vs.* Bank of Columbia, 9 Wheaton, p. 584 *et seq;* Bouv. Law Dic., title Custom.)

But it can only be resorted to when the law is unsettled.

(Winthrop *vs.* Union Ins. Co., 2 W. C. C., 7; Brown *vs.* Jackson, *Ibid*, 24.)

"A custom opposed to a statute is void."
Walker *vs.* The Transportation Company, 3 Wall., 154.

Judge Story, in the schooner Reside, (2 Sumner, 567,) states the law of usage in apt and clear language, and I invite its perusal. See also Sedgwick on Stat. and Com. Law, pp. 526, 257. Ed. 1857.

A usage not consistent with a charter may continue notwithstanding the acceptance of a charter; but a usage repugnant to the charter cannot. By a charter of Queen Elizabeth, it was provided that vacancies in the common council of the borough of L. should be filled up by election out of the 'burgesses and inhabitants.' The charter was accepted, but the corporation afterwards elected burgesses, not being inhabitants, to the office of common councilmen, as they had done before. This charter, and all other franchises, were surrendered to Charles the Second; and William and Mary, by a charter of restoration, granted that the corporation should enjoy all franchises, elections, rights of election, &c., that they had previously enjoyed *by virtue or pretense of any charter, or by any other lawful manner*, right, and title. It was held, that under the charter of Elizabeth burgesses could not be elected to be common councilmen unless they were inhabitants, and that a usage to elect burgesses not inhabitants was repugnant to the charter, and could not be pleaded in explanation of it. It was held, also, that the charter of William and Mary only restored such rights as had been lawfully exercised under or by pretense of former charters, and therefore did not enable the corporation to elect burgesses, not being inhabitants, to the office of common councilmen.

2 Bacon Ab., p. 469.
The King *vs.* Salway, 9 Barn. & C., 424.

Usage can be binding and operative upon parties only as it is the interpreter of a doubtful law; for as against a plain statutory law no usage is of any avail. Hence, speaking of

this maxim, Pollock, C. B., in Pochen *vs.* Duncombe, (1 H. & N., 856, 857,) observes: "The rule amounts to no more than this, that if the act be susceptible of the interpretation which has been put upon it by long usage, the courts will not disturb that construction." Citing Fermoy Peerage case, (5 H. L. Cases, 716,) and see remarks of the same learned judge in Gwyn *vs.* Hardwicke, (1 H. & N., 53,) per Lord Campbell, C. J.; Gorham *vs.* Bishop of Exeter, (15 Q. B., 73, 74;) Edwards *vs.* Darby, (12 Wh., 206.)

In Gwyn *vs.* Hardwicke (p. 53) the learned judge said: "The act in question passed so far back as the year 1813, and however reluctant we might be to disturb an arrangement made more than forty years ago, we ought not, in construing an act of Parliament, to regard the length of time, but construe it in the same manner, whether it has passed forty years or two years."

4. In general, when a contract is made in relation to another, about which there is an established custom, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract. (2 Pet., 138; 5 Binn., Penn., 285; 9 Wend., N. Y., 349; 1 Mees. & W., Exc., 475.) But if the meaning of the contract is certain and beyond doubt, no evidence of usage will be admitted to contradict it. (13 Pick., Mass., 176; 1 Crompt. & M., Exc., 808.)

5. In order to establish a custom, it will be necessary to show its existence for so long a time "that the memory of man runneth not to the contrary," and that the usage has continued without any interruption of the right; for, if it had ceased for a time from such a cause, the revival gives it a new beginning, which will be what the law calls within memory. (1 Black. Com., 76; 2 *Id.*, 31; 14 Mass., 488.)

6. It must also have been peaceably acquiesced in, and not

subject to dispute; for as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, shows that such consent was wanting. (2 Wend., N. Y., 501; 3 Watts, Penn., 178.)

7. A special or particular usage of one party is not binding upon the other, without proof of actual knowledge on his part of its existence and terms. (Holford *v.* Adams, 2 Duer, N. Y., 471.)

8. Evidence of custom was held to be so vague as to length of time it had existed, and so general and indefinite as to the place of its existence, as not *prima facie* to enter into and form a part of the contract sued on, so as to control its provisions as a particular usage of trade. (Jewell *v.* Center, 25 Ala., 498.)

9. A custom must have the force of law before it will be held to be binding in the construction of a contract to the subject of which it is sought to apply the custom. (Clamorgan *v.* Guisse, 1 Missouri, 141, side paging.)

10. A usage to be binding should be definite, uniform, and well known, and it should be established by clear and satisfactory evidence, so that it may be presumed the parties had reference to it in making their contract.

Bowling *vs.* Harrison, 6 How., 259.
Oelricks *vs.* Ford, 23 How., 102.
United States *vs.* Buchanan, 8 How., 102.
Adams *vs.* Otterback, 15 How., 545–546.
Brown *vs.* Jackson, 2 Wash. C. C., 24; 6 Binney, 417; 3 Wash. C. C., 149.
United States *vs.* Duval, Gilpin, 372.

11. It is a settled rule, that although in certain cases evidence of custom or usage is admissible to annex incidents to a written contract, it can in no case be given in contravention thereof.

Yeats *vs.* Payne, 6 Taunt., 446.
Clarke *vs.* Boystone, 13 M. & W., 752.
Palmer *vs.* Blackburn, 1 Brig., 61.

The Attorney General says, "that the construction given to a statute in actual practice is of great weight," citing United States *vs.* Halstead, (10 W., 62, 63;) "and that such construction is adopted by subsequent re-enactment of the provision construed," citing Doramus *vs.* Harrison, (26 Ala., 330;) McKee *vs.* McKee, (17 Ind., 352;) Drennan *vs.* People, (10 Mich., 169.)

I have examined these cases, but they all refer to judicial construction of long standing, which the legislature were held to have contemplated in re-enacting the law.

This is wide of the case at bar; for the construction plead was departmental and not judicial, and we have seen that the courts are in no degree bound by the former.

I am aware that great regard should be paid to the construction which the sages of the law who lived about the time or soon after the law was passed put upon it, (9 Bac. Ab., 246, ed. 1856;) but the sages of the law have never yet construed the statute in question. I think I may safely say that the sages of the law are now first called upon to construe it.

I suggest to the court here this consideration, that each successive law must stand alone, untrammeled by any construction given to a prior law; for example, the act of 1802 cannot be controlled by any construction given to the act of 1799, unless it can be shown that the latter was construed as is claimed, and that Congress enacted the former with a view to that construction, and so on successively till we reach the act of 1813; but there is no proof of construction prior to 1813, and all prior laws therefore must stand aside.

I would be glad to stop here, and make an application of the facts in the case to the principles we have just considered; but I feel that I have already wearied your honors, and I think I may safely trust you to make the application unaided by me. I must, however, say this much—

1. The uniform departmental construction claimed by the Attorney General, I think, is utterly disproved.
2. I think its definiteness likewise disproved.
3. I think it cannot be fairly presumed that the defendant

knew even the undefined and varying departmental decisions in existence when he was enrolled.

If these things are true, there is but one course left, and that is, to pronounce the law as it reads.

This court has repeated many times the rule laid down in Fisher *vs.* Blight, (2 Cranch, 358:) Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed.

This rule is universally acted upon, and is the same, whether we are considering an agreement between parties, a statute, or a constitution; the thing which we are to seek being *the thouyht which it expresses;* that which the words declare is the meaning of the instrument; and the courts have not the right to add to, or take from, that meaning. (Newell *vs.* The People, 3 Selden, 97.) In a brief analysis of the statutes I have shown the plain, natural import of the language used, and I think it will be seen that there is no room for construction.

The theory advanced by the Attorney General involves the necessity of importing into the statutes words which are not to be found there. He requires the court not only to say, as the statute does, that whenever an officer is discharged, except by way of punishment for an offense, he shall be paid, &c., but he requires the court to add the words "except also by reason of resignation tendered, or at his own request." In such case, says Lord Denman, (Lamond *vs.* Eiffe, 3 Q. B., 910,) "we are required to add some arbitrary words to the section. We cannot introduce any such qualification, and I cannot help thinking that the introduction of qualifying words in the interpretation of statutes is frequently a great reproach to law."

And Chief Justice Tyndall says, in Everett *vs.* Wells, (2 Scott, N. C., 531:) "It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing."

It must be perceived that, unless these wise and beneficent rules of law are observed, there is no limit to the inroads

that may be made upon the statutes. If you import into the statute the arbitrary words suggested by the Attorney General, may you not also add others, and thus destroy the law. (McIver *vs.* Ragan, 2 W., 29; Lamond *vs.* Eiffe, 3 Q. B., 913; Everett *vs.* Wells.)

"The only sound rule," says Mr. Justice Story, in such a case, "is to declare *ita lex scripta est*, to follow and to obey."

DISCHARGE.

It is urged that an officer who leaves the service at his own request, or resigns, is not "discharged" in the sense that term is used by the act.

This seems to me utterly indefensible. There is nothing in the statute to indicate the use of the word in any other than its natural and obvious acceptation.

Webster defines the word to mean, "the state of being discharged or relieved of a debt, obligation, office, and the like; acquittal, dismissal."

In the army both officers and soldiers must remain until they are discharged, and the discharge must be initiated by some one or it would never be granted. Either the Government must act on its own motion, or it must be induced to act on the request of some person. Discharges never take place by operation of law and without the action of the War Department.

Discharges are the evidence furnished the officer or soldier that he is no longer under military restraint, and hence we find them varying in form constantly, but meaning always the same thing. The regulations prescribe a form for soldiers, but as to officers there is none.

The court will perceive that to import into the statute a technical definition of the word discharge, in the absence of any proof that it was used in a restricted and technical sense, is as much a violation of rules and principles of law as to import into the statute the exception as to resignations.

The findings and the fact in this case are, that the defendant was "discharged." How can you say the word means more or less than what is naturally conveyed by the use of that term?

If the discharge had said, he is "released" from any further service, or that he is honorably "dismissed" from the service, or "relieved," would not the meaning have been the same?

If there is to be no rule to guide in our construction of the sense in which words are used, of what avail is the law?

You may make black white and white black, when it is manifest from a natural reading that black was meant to remain black.

The word discharge is found in the statutes many times and in many different connections, pertaining to military service; but it always means, as the connection would indicate, simply a release from service.

Thus, in the 11th Art. of War, which prescribes the manner of discharge, &c., the word relates to voluntary and involuntary discharges. (See Scott's Military Dictionary, title, Discharge, pp. 238, 239.)

The mere fact of resignation imparts no change of meaning necessarily to the discharge which follows its acceptance or which is a part of the acceptance.

We have no right to amend the law by judicial interpretation, and introduce into it the words, "except also voluntary discharges."

An examination of the orders issued to officers discharged upon resignation will show, by the variety of language employed, that it differs in no essential particular from the discharge given under other circumstances.

Sometimes they read, "at his own request," A. B. "is hereby discharged the service;" or thus, "the resignation of" C. D. "is accepted, and he is hereby honorably discharged the service;" or thus, "the resignation of" E. F. "is accepted, to take effect" of such a date. Indeed, I could suggest a dozen or more forms with which I am familiar, each differing from the other, but all meaning precisely the same thing, viz, that the officer is released from military service. (See appendix to brief and argument for instances.)

NOTE.—As to Discharge, see Digest, J. Ad. Gen., 145; *Ibid*, as to Dismissal, 147; Prendergrast, 235.

The law does not use the word muster-out.

I have talked with no intelligent military officer who does not regard the matter as I have given it, and the views I have just expressed are a synopsis of those given me within a day or two by one of the best-informed military gentlemen on duty in this city. This same officer says that the form of discharge has never been considered as having any influence upon the question of travel-pay, except so far as it showed that it was given at the request of the officer; thus, and for this reason only, cutting him off from the allowance. Here I desire to point out to your honors how unfairly the rule often works.

A. B. tenders his resignation, and the order which discharges him shows that he resigned. He presents his order to a paymaster for final payment of his accounts, and he does not receive travel-pay.

C. D., on the same day, asks to be mustered out or resigns, and the order which discharges him makes no mention of the request. He presents his order for final payment, and is paid travel-pay.

My own case is in point. I was on duty in the War Department at the close of the war. My commission was in the regular army. A friend in the department suggested that if I used the word resignation in my request I would be denied travel-pay, but if I used the word muster-out I would be paid, and the order was framed accordingly. I was paid travel allowance to Iowa, although it was well known I was seeking a discharge for the purpose of entering upon the practice of my profession. This was true of one of my partners in business, Col. Hosmer; while as to another, General Gillmore, who was in the city on court-martial duty, too badly wounded for field service, and who resigned before we did, he got no travel-pay. On the other hand, I think I could name scores, if not hundreds, who resigned about the same time, unwilling to await the tardy mustering out of the army, who got no travel-pay; officers who had served throughout the war, and much more to the credit of the service than I can claim to have done. I am not quite sure,

but I suspect that my learned friend the Assistant Attorney General was of the latter class.

There is something inequitable, if not wrong, in this technical distinction. Certainly the law does not warrant it, and I cannot believe that this court will uphold a practice at once so much in violation of just principles, as well as of the statute.

The rewards of the service should be shared equally, so far as possible; and it is always possible to pay officers equally, where the statute provides alike for all.

RESIGNATION.

I think, then, I may safely assume that the turning point in the controversy is not whether an officer is discharged who leaves the service at his own request or who tenders his resignation, but it is whether the resignation forfeits this pay. It is worth our while, therefore, to look a little closely into this distinction.

The theory is that the officer takes himself out of service; that he chooses to go, and does go without any action of the Government in the matter, and he must pay the penalty by forfeiture of a part of his pay. I reply—

First. This theory is not founded in fact or reason.

An officer incurs a grave punishment if he presumes to act upon this theory. He is hedged about by the strictest rules on the subject.

The Government always reserves the right to grant the request or refuse it, and the officer is powerless to control its action.

"No officer will be considered out of the service on the tender of his resignation, until it shall have been duly accepted by the proper authority." (Army Regulations, 1863, Art. V, sec. 24.)

If he quit his post prior to due notice of the acceptance of his resignation, he shall be registered and punished as a deserter. (Sec. 2, act August 5, 1861; 12 Stat., 316.)

If his application be refused, he must remain in the service

or be branded a deserter. (See also ¶ 1647, Digest Judge Advocate General, 1868, p. 328.)

It seems to me that it is a misnomer to speak of a discharge under such restrictions as a voluntary discharge, except you apply the word voluntary to the United States. To search the meaning closely, a resignation is only the declaration of the officer that he would prefer to quit the service if his employer would release him. But the employer decides whether the request shall ripen into separation, and the employer issues the discharge. If it is a question of preference merely of remaining in or going out, I do not believe one of the thousand officers mustered out at the close of the war should have been paid travel-pay; for universally they were glad and anxious to return to civil pursuits.

But, to further show the difficulties encountered by officers in securing a discharge, I wish to call attention to general orders of the War Department issued during the war.

General Order 45, War Department, July 19, 1861, ¶ IV, provides as follows:

"Officers of the volunteer service tendering their resignations will forward them through the intermediate commanders to the officer commanding the department or *corps d'armee* in which they may be serving, who is hereby authorized to grant them honorable discharges. This commander will immediately report his action to the Adjutant General of the army, who will communicate the same to the governor of the State to which he belongs." (See General Order No. 40, April 15, 1862; General Orders No. 238, July 28, 1863; General Orders No. 79, May 1, 1865; General Orders, No. May 6, 1865.)

Scott's Dictionary, p. 239.

Captain Parker's Case, Court of King's Bench, Prendergrast, p. 246, revised edition.

It is then the action of the Government, and not of the officer, that severs the relation, and there can be no difference, so far as the discharge or dismissal from service is concerned, whether it is solicited by the officer or done without his solicitation. The deciding and controlling mind is not the officer's. If the fact that the officer was willing to leave

the service, or left voluntarily, should govern, there were few cases in which the Government would have paid travel allowance. The officers who resigned, most of them on account of wounds received in battle and disability incurred, uniformly claimed this allowance, and, as we have seen by decision of Comptroller, in some instances obtained it. It is not true that officers acquiesced in the decision and this claimant sought remedy through the courts.

Second. The law, the general orders, and army regulations on the subject clearly show that discharges by resignation were contemplated as among the most natural things to occur; and its being expressly provided that they should be given honorable discharges, they are thereby taken out of the only exception mentioned in the law, viz, discharges by way of punishment. It would seem to me that if Congress or the deparments had contemplated any forfeiture as attached to this means of discharge, there would somewhere be found an intimation of it; but it is nowhere to be found, and the officer first encounters it when he asks payment of his allowances. It is a snare and a deceit to the officer that he should enter the service without any intimation that his contract was to be subjected to a peculiar construction; that during his period of service he should at no time be told of this construction, and that he should only learn it when he comes to receive his final payment. A court ought not to presume that Congress ever intended to deal in this manner with any class of its citizens, much less with those who serve their country upon the field of battle. In a patriotic war, like that which has just closed, the last consideration which enters the mind of an officer or soldier is the question of his pay, and certainly it should be the last thing a just government should do to take advantage of such ingenuous and confiding patriotism as fired the hearts of our soldiery. The rule ought to be, and I believe is, to construe liberally all promises of pay and allowances, and that government which pursues a contrary rule cannot hope for the enthusiastic support of its citizens.

The United States *vs.* Morse, 3 Story, 87.

The glory of all governments that are truly great begins and ends with the strictest fidelity and the most scrupulous faith in the enforcement of obligations with its subjects. I have said, and I repeat, that the great majority of resignations tendered were forced upon the officers from exposure to danger, to the elements, and to unusual fatigue. There is no less of credit due the resigned officer under such circumstances than to the officer who, knowing his incapacity, remains in the army, useless to his government, until it chooses to discharge him of its own motion. Then, why, I ask, should this court erect a barrier to pay, and at the same time create an implied censure to so honorable a class.

Third. We may derive a strong argument in favor of the position I have taken from the fact that all pay and allowances other than travel-pay are not denied to an officer who is discharged by resignation, and yet the law of the case would be precisely the same in both instances. This argument is strengthened also by the further fact, that the whole system of pensions to discharged officers is administered without making any discrimination such as is urged in this case.

I think it fair to assume that Congress meant the same thing by the use of the terms "whenever discharged," in all cases, and that it is an unwarranted assumption of authority to say that those terms were used with any other limitation than such as Congress chose to impose.

In this connection I may, perhaps, again remind the court of the only exception which Congress has made in the promise of his pay, namely, the case of an officer discharged by way of punishment for an offense. "*Exceptio unius est exclusio alterius.*" (Broom's Maxims, London, 1864, p. 626.)

How can you, with legal propriety and with due regard to so familiar a maxim, introduce other exceptions without something beyond departmental ruling to show that other exceptions were intended by Congress; and the application of this maxim does no violence to what would seem to have been the purpose of the legislature. The accounting officers tell us that the design was to give the officer the means of reaching home after he had left the service, and I can see

no reason why this design should not be carried out towards the officer who asks for and obtains his discharge, and the officer who gets it without asking.

General Order 79, of 1865, speaks of officers whose services are no longer required, and all discharged for this *expressed* reason got travel-pay. When the Government discharges an officer who asks for it, does it not, in effect, say his services are no longer needed?

Fourth. The theory advanced by the Government is, that a resignation forfeits travel-pay. Now, the pay of an officer or soldier can never be forfeited except by way of punishment for an offense.

There must be express law to warrant any stoppage of pay, and pay is never stopped, except it be to impose a penalty.

Scott's Dictionary, p. 476.
Judge Ad. General Digest, 184, 185.
Army Regulations, 1861, p. 343, 344.
Bouvier Dictionary as to Forfeiture.

And if we turn to the primary meaning of the word, we will find that a forfeiture always implies some misdeed, neglect of duty, breach of contract, penalty, fault, offense, or crime. (See Webster.)

Is it a crime, or an offense, or penal, or a fault, or misconduct in an officer, to tender his resignation?

The law imputes nothing of the kind to the officer; the law allows him to resign. How, then, can a presumption of forfeiture be raised? To do so, would violate every principle of law.

CONTRACT.

The parties to this suit must be treated as though they were both citizens. No rule of law must or can be invoked in aid of the United States, which could not be were the plaintiff John Doe.

The case is one of contract. The United States invited

this defendant to enter their service upon the highest form of promise, viz, a statutory contract or agreement to pay him certain sums. This contract is to be found in various statutes. Pay proper in one, rations in another, servants' pay in another, and travel pay in another. If we follow these various items which go to make up the officers' compensation, it will be seen that they all stand on a similar footing.

The law fixing the officers' pay is complex, and very few in service to-day can correctly make up a pay account.

To illustrate this I refer your honors to the form used. See Regulations.

Scott's Dictionary, 454, title Pay.

Ordinarily officers scarcely look at their accounts. They are made up by paymasters, and are signed by the officer, and there is the end.

The act of July, 1861, putting volunteers on the footing of regulars, the orders and regulations fixing their pay, mean not such pay as the accounting officers choose to give, but such as the *law* and *regulations* give.

Congress, by the Constitution, (art. 1, sec. 8,) has the exclusive power "to raise and support armies," and "to provide for calling forth the militia."

When Congress has spoken the law into existence, it is an unwarrantable assumption for the accounting officers to set it aside, or to construe it out of existence.

Each enlistment is a separate contract, and must be enforced without regard to others.

In the civil service, could a newly-appointed officer be deprived of a legal perquisite because his predecessors had acquiesced in a construction which refused it? No number of men, by sleeping upon *their* rights, can prejudice a man who has discovered *his*, and chooses to enforce them.

But, your honors, a complete answer to the claim that A. B., in 1868, is deprived of a legal right, because C. D., in 1816, or 1832, or 1847, or 1860, acquiesced in an adverse decision in his case, claiming the same right, is to be found in this, namely: that prior to the act of June 25, 1868, (14

Stat., p. 397,) there was no complete remedy in the courts of the United States. (Gordon *et al. vs.* The United States, March 10, 1865, opinion of Chief Justice Chase, 2 Wall., 561.)

I have shown, and the Attorney General has greatly added to the exhibit, that this travel-pay has been persistently urged upon the Government year after year, before and repeatedly during the rebellion. This shows conclusively that the officers used every effort in their power to secure their rights; and it further shows that they never acquiesced in the construction. And finally, even before an appeal to this tribunal was given by Congress, the defendant, Price, brought suit in the Court of Claims, the first and only tribunal through which a judicial interpretation of the law could be had.

Pertinent here, I read from a very instructive case, (United States *vs.* Dickson, 15 Peters, p. 161, 162.)

The learned justice who announced the decision, Mr. Justice Story, said:

"It has been also argued that the uniform construction given to the act of 1818, ever since its passage, by the Treasury Department, has been, that the act has reference to the fiscal year. The construction so given by the Treasury Department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. The construction given to the laws by any department of the executive government is necessarily *ex parte*, without the benefit of an opposing argument, in a suit where the very matter is in controversy; and when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers deriving their salary and emoluments therefrom, for they cannot bring the case to a test of a judicial decision. It is only when they are sued by the Government for some supposed default or balance that they can assert their rights. *Their acquiescence, therefore, is almost from moral necessity, when there is no choice but obedience, as a matter of policy or duty.* But, it is not to be forgotten that ours is a Government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws in the last resort; and however disagreeable

that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it. The present question, then, must be decided upon the same principles by which we ascertain the interpretation of all other laws—by the intention of the legislature, as it is to be deduced from the language and the apparent object of the enactment."

To show your honors how army officers have regarded their powerlessness heretofore, I read from Scott's Military Dictionary, p. 502, title "Remedy:"

"The rules and articles for the government of the army," says this author, "are defective in not providing sufficient remedies for wrongs. The army of the United States is governed by law; the law should therefore provide a sufficient remedy for cases in which the rights of officers are wrested from them by illegal regulations purporting to interpret the true meaning of acts of Congress. In cases arising in the land and naval forces of the United States, where the true construction of any act of Congress is in dispute, legislation is wanted to enable an officer who thinks himself wronged by an illegal executive decision to bring the matter before the federal courts to determine the true exposition of the statute or authority in dispute."

Here, your honors, is a thoughtful army officer, deploring the inadequacy of redress given officers, who in the next edition of his valuable work might congratulate the army that they have at length legal redress. But what shall this court say about it? You are asked to decide that this remedy is empty and profitless in past cases, or rather in cases similar to past cases.

There is probably no military law in existence, and probably never will be one, that is not, in points that may arise under it, similar to previous laws construed by departments. If the doctrine urged at the bar here shall prevail, the Court of Claims is a mockery to the whole army and to the volunteers now out of service.

I say to the Attorney General that this Government cannot afford to exclude these men from its tribunals. I say to him, too, that the principle he here urges so zealously will prove a double-edged sword. If we are to sweep away the

law and the remedy because the construction is adverse to claimants, we must also sweep away the law and foreclose all cases in the courts where the ruling has been favorable, though in violation of law. This court cannot say it is estopped from disturbing usage in the one case and not in the other.

I am not blind to the fact, your honors, that there is a large sum of money involved in this case, for the Attorney General in his brief has so reminded your honors; but I am blind to the fact that the magnitude of the sum involved changes the law of a case. I pray never to think so meanly of our judiciary as to suppose this high court will allow such a consideration one moment's reflection or a feather's weight.

This, your honors, is a class case. The sum involved is $234, and if judgment should be awarded, this is all the Treasury would be called upon to pay.

The result of the principle established rests after all with Congress. The contest begun here must be concluded elsewhere. Not one dollar more than you may award will ever be paid until Congress supplements the judgment by an act for the relief of the other officers.

Your honors decided the case of Hosmer at the last term. You pronounced the law as to bounty in all similar cases. But to this day not one soldier has been paid, and not one will ever be paid, before congressional action. The House of Representatives have acted in the matter, but the bill sleeps in the Military Committee of the Senate.

May it please the court, I have endeavored fairly to lay before you all I have been able to learn on either side of the question. I have withheld nothing which the most patient and wearying search into the facts and law of the case could elicit.

If I have aided the court in an effort to arrive at the truth, I have performed my office as an officer of the court and the advocate of my client.

I ask only that the law of the case, as governed by fact and principle, may be pronounced; and I will do my learned friend the Assistant Attorney General the justice to say that this is all he seeks.

APPENDIX.

The following are samples of various orders of discharge where officers resign. They are taken from files in our office, and are all different in form, but are all discharges, and have the same meaning and effect. Still other forms have been given in the argument. N. P. CHIPMAN.

HEADQUARTERS DISTRICT OF THE OHIO,
NASHVILLE, TENN., *July* 6, 1862.

Special Orders No. 114.

I. The resignations of the following-named officers are hereby accepted and they are accordingly honorably discharged the service of the United States from this date:

Captain E. K. Stephens, Co. A, first bat. Kentucky cav.

By command of Major General BUELL.

(Signed) O. D. GREENE,
A. A. G.

HEADQUARTERS DEPARTMENT OF THE TENNESSEE,
YOUNG'S POINT, LA., *January* 28, 1863.

Special Orders, No. 28.

[Extract.]

21. The resignation of First Lieutenant Justus D. Andrews, one hundred and fourth regiment Illinois infantry volunteers, is hereby accepted, to take effect this day.

By order of Major General U. S. GRANT.

JNO. A. RAWLINS,
Assistant Adjutant General.

HEADQUARTERS SEVENTH ARMY CORPS
AND DEPARTMENT OF ARKANSAS,
LITTLE ROCK, *February* 25, 1864.

Special Orders No. 28.

[Extract.]

IX. The following-named officers, having tendered their resignations and failed to exhibit therewith the necessary evidence of the settlement of their accounts required in General Orders No. 238, series of 1863, from the War Department, are hereby honorably discharged the service of the United States from this date, for the good of the service, with the condition that they shall receive no final payments until they have satisfied the pay department that they are not indebted to the Government, to wit:

Captain Thomas Jenkins, company G, fortieth Iowa infantry volunteers.

By order of Major General F. Steele.

W. D. GREEN,
Assistant Adjutant General.

HEADQUARTERS DEPARTMENT AND ARMY OF THE TENNESSEE,
EAST POINT, GEORGIA, *September* 21, 1864.

Special Orders No. 213.

* * * * * * * * * *

X. The following-named officers, having tendered their resignations to make room for veterans, are hereby honorably discharged the service of the United States, with condition that they shall receive no final payments until they have satisfied the pay department that they are not indebted to the Government:

R. J. Adams, first lieutenant C Company, sixty-sixth Illinois infantry volunteers.

* * * * * * * * * *

By order of Major General O. O. HOWARD.

WM. T. CLARK,
Assistant Adjutant General.

Official:
SAM. L. TAGGART,
Assistant Adjutant General.

Paid in full, and no transportation and subsistence allowed by me,
R. VAN ALSTYNE.
Paymaster, U. S. A.

HEADQUARTERS, DEPARTMENT NINETEENTH ARMY CORPS,
NEAR CEDAR CREEK, VIRGINIA, *November* 7, 1864.

Special Order No. 81.

[Extract.]

II. The following-named officers, having tendered their resignation, based on surgeon's certificate, are hereby honorably discharged the military service of the United States, on condition that they shall receive no final payment until they have satisfied the pay department that they are not indebted to the Government.

Captain George Creasy, company I, thirtieth Massachusetts volunteers.

By command of Brevet Major General EMORY,
DUNCAN S. WALKER,
Assistant Adjutant General.

ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *January* 7, 1865.

SIR: Your resignation has been accepted by the President of the United States, to take effect the 6th day of January, 1865.

I am, sir, very repectfully, your obedient servant,
S. F. CHALFIN,
Assistant Adjutant General.

Captain JOHN H. MUNROE,
A. A. G., U. S. Vols., Muscatine, Iowa.

HEADQUARTERS, DEPARTMENT OF THE CUMBERLAND,
NASHVILLE, TENN., *February* 19, 1865.

Special Orders No. 37.

[Extract.]

The resignation of the following-named officers are accepted to take effect from this date, with condition that he shall receive no final payments until he satisfies the pay department that he is not indebted to the Government: First

Lieutenant Jacob Kuhl, forty-fourth Illinois volunteers. Cause, business affairs.
By order of Major General THOMAS.

Signed, JONATHAN HOFFMAN,
Assistant Adjutant General.

[Form No. 4.]

HEADQUARTERS DEPARTMENT OF THE MISSOURI.
ST. LOUIS, *February* 28, 1865.

Special Orders No. 58.

[Extract.]

6. The following-named officers having tendered their resignations, and failed to exhibit therewith the necessary evidence of the settlement of their accounts, required in General Orders No. 238, series 1863, from the War Department, are hereby honorably mustered out of the service of the United States from this date, with the condition that they shall receive no final payments until they have satisfied the pay department that they are not indebted to the Government:

First Lieutenant Geo. F. Crocker, Co. K, 2d colored cav.

By order of Major General DODGE.

Signed, J. W. BARNES,
Assistant Adjutant General.

HEADQUARTERS, DEPARTMENT OF ARKANSAS,
LITTLE ROCK, ARKANSAS, *May* 14, 1865.

Special Orders No. 107.

[Extract.]

* * * * *

14. The following-named officers are honorably discharged the military service, on tender of resignation, upon condition that they shall receive no final payments until they have satisfied the pay department that they are not indebted to the Government, viz:

First Lieutenant M. J. Couch, company "C," 69th U. S. colored infantry.

* * * * *

By command of Major General J. J. REYNOLDS.

JOHN LEVERING,
Assistant Adjutant General.

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *June* 14, 1865.

Special Order No. 303.

[Extract.]

* * * * *

8. The following-named officers having tendered their resignations, are, upon the recommendation of their superior officers, hereby honorably discharged the service of the United States, with condition that they receive no final payment until they have satisfied the pay department that they are not indebted to the Government.

First Lieutenant HENRY PORTER, major fifth United States col. cavalry, commanding regiment.

Official:

True copy: Captain HENRY M. KIDDERS,
Major Fifth United States Colored Cavalry, Comdg. Regiment.

By order of the Secretary of War.

Signed, E. D. TOWNSEND,
Assistant Adjutant General.

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *August* 10, 1865.

Special Order No. 431.

[Extract.]

13. First Lieut. J. J. Johnson, company G, eighth United States veteran volunteers, first army corps, having tendered his resignation, is, upon the recommendation of his superior officers, hereby honorably discharged the service of the United States on account of special disability, with condition that he shall receive no final payment until he has satisfied the pay department that he is not indebted to the Government.

By order of the Secretary of War.

Signed,

E. D. TOWNSEND,
Assistant Adjutant General.

HEADQUARTERS DIVISION OF THE GULF,
NEW ORLEANS, LA., *August* 28, 1865.

Special Orders No. 37.

[Extract.]

* * * * *

6. The following-named officer, having tendered his resignation, is honorably discharged from the military service of the United States on account of physical disability, with condition that he shall receive no final payment until he has satisfied the pay department that he is not indebted to the Government.

By command of Major General P. H. SHERIDAN.

Signed,

GEORGE LEE,
Assistant Adjutant General.

HEADQUARTERS DEPARTMENT OF WASHINGTON,
TWENTY-SECOND ARMY CORPS,
WASHINGTON, D. C., *June* 2, 1865.

Special Order No. 129.

[Extract.]

* * * * *

9. The following-named officers, having tendered their resignation, are hereby honorably discharged the military service of the United States:

First Lieutenant G. S. Brown, thirtieth Massachusetts volunteers.

By command of Major General AUGUR.

A. EKIN,
Assistant Adjutant General.

Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES
vs.
JOSEPH W. PRICE.
} On rehearing.

SUGGESTIONS SUPPLEMENTAL.

The law of 1813 reads, as we have seen: "Whenever any officer shall be discharged from the service, *except by way of punishment for an offense*, he shall be allowed his pay and rations, or an equivalent in money, for such term of time as shall be sufficient to travel from the place of discharge to the place of his residence, computing at the rate of twenty miles to a day."

General order 43, July 10, 1861, which was made law by act of August 6, 1861, reads: "Commissioned officers of volunteers, *received* into the service of the United States for two and three years, or for during the war, will be entitled to receive one day's pay and subsistence for every twenty miles' travel from the place of enrollment to place of muster into the service of the United States, and from the place of discharge to the place of enrollment, the distance to be estimated by the most direct mail route."

It is claimed by the Assistant Attorney General that to both these laws it is competent for departmental authority to superadd, *Except* officers who signify a desire to be discharged, or, what is the same, officers who tender resignations.

If such an exception can be superadded, by such authority,

to laws promising certain *travel-pay* to those entering the military service, the same can be superadded to laws promising other kinds of compensation to the same class. Let us see to what illegality and injustice and absurdity this leads.

The law of 1792 (1 Stats., sec. 9, p. 273) reads, that "if any person, whether officer or soldier, belonging to the militia of any State, and called out into the service of the United States, be wounded or disabled while in actual service, he shall be taken care of and provided for at the public expense. Superadd: *except* the officer or soldier so wounded or disabled signified a desire to be discharged.

The act of March 3, 1855 (10 Stats., sec. 1, p. 702) reads: "That each of the surviving commissioned and non-commissioned officers * * * who were regularly mustered into the service of the United States * * * * shall be entitled to receive a certificate or warrant from the Department of the Interior for one hundred and sixty acres of land: * * * * * *Provided*, The person so having been in service shall not receive said land warrant if it shall appear by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from the service." Superadd: *And provided*, he shall not receive said land warrant if he signified a desire to be discharged.

The law of September 28, 1850 (Stats. at Large, vol. 9, p. 520) gives land warrants to certain officers and soldiers, and contains the proviso,

"That whenever any officer or soldier was honorably discharged in consequence of disability in the service before the expiration of his period of service, he shall receive the amount to which he would have been entitled if he had served the full period for which he had engaged to serve." Superadd: *Except* such disabled officer signified his desire for such a discharge.

Act of January 29, 1813, section 10 (Stats. at Large, vol. 2, page 795,) reads: "That if any officer * * * shall be disabled by wounds or otherwise while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pension, under such regu-

lations as are or may be directed by law: *Provided always*, That the compensation to be allowed for such wounds or disabilities to a commissioned officer shall not exceed, for the highest rate of disability, half the monthly pay of such officer at the time of his being wounded or disabled." Superadd: *And provided*, such wounded or disabled officer shall not be placed on said list if he signified a desire to be discharged.

Act March 30, 1814 (Stats. at Large, vol. 3, p, 113, section 13,) authorizes the President to discharge certain supernumerary officers, and provides that "officers so discharged shall be allowed, in addition to the mileage already authorized by law, three months' pay." Superadd: "*Except* officers who signified a desire to be so discharged."

Joint resolution No. 102, July 28, 1866, reads: "Whereas by the joint resolution No. 77, of Congress, approved July 4, 1864, a special income tax of five per cent. on all incomes exceeding six hundred dollars was directed to be assessed and collected, and was enforced generally against all citizens accessible to the revenue officers, but was not enforced against all our soldiers then in the field in the active service of the country; and whereas since the surrender of the insurrectionary armies, and the disbanding and return of the federal soldiers to their homes, said tax is being, with manifest hardships, assessed and collected of them in many parts of the country: therefore,

Be it enacted, &c., * * "That said special tax, so imposed, shall not be further enforced against officers or soldiers lately in the service of the United States, and who have been honorably discharged therefrom; and that the Secretary of the Treasury direct the proper observance of this resolution by all revenue officers." Superadd: "*Except* in cases of officers who signified a desire to be so discharged."

Will it be claimed by the Assistant Attorney General that the superadded exceptions to the acts relating to traveling allowances can have judicial sanction, but that similar superadditions to these other acts can have none?

In some of these last-mentioned acts it will be noticed the benefit allowed or provided was a gratuity or gift, while in

the matter of travel-pay it was a part of the contract. It is difficult to conceive by what reasoning he could sustain an attempt of the kind where the law promises travel-pay, and not in the laws promising other compensation and benefits.

A search of the statutes would show many other instances where exceptions, superadded to suit the opinions of departmental authorities as to the necessities or proprieties of the case, would apply as well as in the law of travel-pay.

But further: The superadded exception, excluding officers from travel-pay who had signified a desire to be discharged, has been enforced in some instances, but not in others of the same class; that is to say, this superadded exception was not insisted on. By "special decision" it was waived, or ignored, or set aside, or temporarily repealed by departmental authority. (See page 26 of the argument.)

If the law generally excludes officers from the promised travel-pay who signified a desire to be discharged, where is the provision of the act which allows a "*special decision*," by departmental authority, to direct such a payment to be made? It would have seemed impossible to get over this difficulty; but the doctrine of the Assistant Attorney General makes the way easy. Having superadded to the terms of the law one exception, superpose another, so as to make it read, "whenever any officer or soldier shall be discharged the service, except by way of punishment for an offense, he shall be allowed his pay and rations," &c., *except* the officer signified a desire to be so discharged; *Provided*, however, that by special decision of departmental authority, officers shall be entitled to such pay, notwithstanding the fact that they signified a desire to be discharged.

This mode of construing law one way by departmental superadditions, and another by departmental *special decisions*, if it could be sustained, might sometimes be quite convenient; and if the Government could always be assured of the services of men possessing as much probity as characterizes the present public servants, it might also, to a great degree, be *pecuniarily safe*. But, considering how fearfully and wonderfully man is made, how intimately his mental faculties

are connected with his physical organism, how easily his equanimity of mind is overthrown by unfavorable physical conditions, how frequently his mental digestion and assimilation of legal provisions may be, to some extent controlled, at least, disturbed, by the physical indigestion of a bit of cheese or a blot of mustard; so long as it is human or possible for departmental authorities to err, is it wisdom to invest them with legislative power to amend a statute, and to finally determine the rights of parties under it? How much, or little, cheese and mustard have played a part in forcing my client from the departments to the courts for his rights, we will leave an open question.

But I submit that one of two things must be true: either the *law, as written*, gives travel-pay to officers discharged, who signified their desire to be so released from the service, or it does not. If the law gives it, a "special decision" of departmental authority, *allowing it to be paid*, is unnecessary, of no weight, and is little less than a burlesque. If the law does not give the travel-pay to such officers, no "special decision" of any departmental authority could give an officer a shadow of right to such pay.

But there is something besides what is written in the statute books, and besides what is superadded thereto by departmental authority, which bears upon the question of the contract under which my client entered the service.

By his muster-in roll it will be seen that he was *accepted* by the Government for the term of "three years, *unless sooner discharged.*" No one will claim that he could discharge himself. The Government has the right to his services for three years, unless for some reason or other it *sooner discharges him.*

In the cases of all volunteer officers who were enrolled the muster-in roll states in explicit terms, that they were accepted for a certain time—six months, one, two, or three years, "*unless sooner discharged.*" *Whenever* honorably discharged, however soon after date of muster-in, the terms of that muster-in are fully satisfied.

Turn again to the law. It reads, that *whenever* officers of volunteers are discharged, they shall be entitled to travel-

pay. Does not the law as it is written apply the same meaning to a discharge ordered at the expiration of "three years" and to a discharge "*sooner*" ordered?

There is no conflict or inconsistency between the terms of the law and the terms of muster, nor shadow of doubt as to what the same word, "discharged," means, or was intended to mean. The law, except in cases of an offense committed, makes no mention of, or reference to, *what reason* the Government shall entertain, or express, or act upon, in discharging an officer. The muster-in roll makes none. On these two hangs all the right of my client to travel-pay.

The tender of resignation is but the expression of a desire to be discharged. There is nothing in the fact of such an expression that is a breach of contract, or that by law, or implication of law, works a forfeit of any portion of the compensation promised under the contract.

He may be discharged sooner than three years from date of his muster-in, and against his desire; or it may happen to be in accordance with such desire. He may, in anticipation of a *sooner* discharge, ask to be retained for the full three years; nevertheless the Government may discharge him. He may, in ignorance of an intention of the Government to discharge him sooner than three years from date of muster-in, ask to be discharged. *Whenever discharged* the contract gives him travel-pay.

If, under the terms of the law, the desire of an officer to be discharged is involved in the question of his right to travel-pay, it must have the same effect, whether expressed or not; and departmental authorities should in all cases, when ordering the discharge of an officer *sooner* than three years from the date of acceptance and muster-in, require him to certify whether or not the discharge was in accordance with his personal choice, in order to determine whether or not traveling allowances were due him. But the meaning of "whenever any officer shall be discharged," as written in the law, turns upon no such consideration as the *desire* of the officer, whether expressed or otherwise.

Acts of Congress, at different times, have authorized the

consolidation of regiments reduced below the minimum, and provided that the supernumerary officers might be honorably discharged; but such laws did not create the right to so discharge them. The right was previously vested in the Government. It had accepted and mustered them in for a period of three years, unless it should for any reason elect to "*sooner*" discharge them. Neither did such laws create a right of the discharged officers to travel-pay. That right was vested in him at the date when he was accepted and mustered into the service.

Sometimes the Government expressed its reasons for honorably discharging officers sooner than three years from date of acceptance and muster; in other cases, no mention was made of the reasons. Sometimes circular letters, or general orders were published, to the effect that officers (who, for any reason were not longer needed,) would be honorably discharged; but this did not change the terms of their muster-in, as to when they might be so discharged, nor in any way affect the total pay and allowances to which by law they were entitled at date of discharge. (See General Order 82 of 1865.)

Some officers signifying their desire to be discharged under the provision of such orders were discharged, and were paid traveling allowances, while others, signifying the same desire under precisely similar circumstances, were discharged and denied traveling allowances. An officer asking to be "mustered out" would be paid, while an officer using the phrase, "tender my resignation" would be refused. (See page of the argument, 54.)

But the *law* was the same in both cases, and both officers were entitled to it. The right to travel-pay having vested, when the officer was accepted and mustered into the service under the act, which promised that it should be paid "*whenever*" he should be discharged, he could only forfeit that right by the commission of an offense and consequent dishonorable dismissal from the service. The rights of officers discharged, whether in accordance with their desire or otherwise—whether they had expressed a desire in one form or another, or had not expressed it—could in no way be modified by the

publication of an order announcing that, for certain named or unnamed reasons, no offense being involved, officers would be honorably discharged.

The Government cannot be presumed to do an act *prejudicial* to the interest of the service. On the contrary, all its acts must be presumed to have been directed by a purpose to promote such interests. Whenever an officer mustered into the service for three years, unless sooner discharged, is by act of the Government sooner released, discharged from further service, it is to be presumed that the Government deemed it disadvantageous to the service to retain him longer, whether to reduce the number of officers, or to make room for "*veterans*," or because the officer, by hardship and exposure, had been rendered less competent to perform required duties than when accepted and mustered in, (or for any cause incompetent,) or because he was wounded, or sick, or disabled, or because he had signified a desire to be released from further service;—whatever may have suggested the action of the Government in releasing him from its further service, it is to be presumed that act itself was because, for good and sufficient reasons, it deemed it disadvantageous to retain him, and therefore discharged him sooner than the three years from the date of acceptance and muster-in. Can it be presumed that the question whether or not it was disadvantageous to retain him turned upon the condition that he was or was not entitled by law to travel-pay—that if he was so entitled he should be retained, but if he was not it would be disadvantageous to retain him and therefore he should be discharged?

Another important fact involved in the administration of the law giving travel-pay is this: Officers who are discharged upon their own request, while denied travel-pay by departmental authority, yet were frequently furnished transportation in kind by the Government. Upon what grounds were they given the latter? Where is the law for it?

The law of 1802 (Stats. at Large, vol. 2, p. 136) provides for paying officers not to exceed $1 25 per day, when obliged

actually to incur extra expense in traveling and sitting on general courts martial.

Army Regulations of 1821 provide an allowance for transportation of their baggage when traveling under certain *orders*.

Army Regulations of 1825 provide for an advance to officers traveling *under orders*, when it is preferred and can be ascertained.

Army Regulations of 1835, for the first time, provide the payment to officers traveling *under orders* of ten cents or any money rate per mile in lieu of transportation in kind.

Army Regulations of 1861 (p. 164 and 165, ¶ 1109 and 1111) provide that officers traveling under orders shall have ten cents per mile or the actual cost of transportation, and that when an officer travels on urgent public duty, without orders, he shall report the case to the superior officer who had authority to give the order, and, if approved by him, then shall be allowed the actual cost of transportation.

Act of Congress, July 17, 1862 (Stats. at Large, vol. 12, p. 594) provides that not more than six cents per mile shall be allowed for transportation, except in case of travel from east to west, and *vice versa*, over the Rocky Mountains, when ten cents may be allowed; and that no mileage should be paid except for travel actually performed, and *in obedience to orders*.

The act of June 20, 1864 (Stats. at Large, vol. 13, p. 145) provides that when the Government shall furnish transportation and subsistence to discharged officers and soldiers from the place of discharge to the place of their enrollment or original muster into the service, they shall not be entitled to travel-pay or commutation of subsistence. But this law by no means provides that an officer not entitled to travel-pay may be paid six cents per mile, or furnished transportation in kind, from the place of his discharge to his place of enrollment. It merely prohibits officers and soldiers from receiving mileage or transportation in kind, and travel-pay besides; and would seem to have been intended to correct some varying usage or "special decision" of departmental

authority, which gave to officers or soldiers who were legally entitled only to one day's pay and subsistence for each day's travel from place of discharge to place of enrollment, six cents per mile, or transportation in kind also.

According to the theory of the Assistant Attorney General, it cannot apply to officers who signified their desire to be discharged, for he holds that they are not entitled to travel-pay. If he admits that it must or may be construed as giving one or the other to officers who were not previously entitled to either, he admits that such officers were thereafter entitled to travel-pay as fully as to transportation in kind, or six cents per mile, at the date of their discharge.

The act of July 15, 1870 (section 24) provides that officers traveling under *orders*, and not furnished transportation by the quartermaster's department or on a conveyance belonging to or chartered by the Government, shall be paid ten cents a mile.

There is nothing to be found, then, in the published Regulations of the Army, nor in the laws passed by Congress, giving officers either transportation in kind or money in lieu thereof, except where the travel is actually performed in *obedience to orders*. An officer when discharged ceases to be subject to orders, and therefore cannot travel to his place of enrollment *in obedience to orders;* therefore he is not entitled, when discharged, to transportation in kind or any money-rate per mile in lieu thereof.

The only provision of law or army regulations entitling officers, after being discharged, (and therefore *not subject to orders* of any kind,) being the law promising the amount of one day's pay and subsistence for every twenty miles from place of discharge to place of enrollment, it follows that officers who signified a desire to be discharged were, when discharged, entitled to this, if to any allowance. If the departments would furnish all the facts bearing on this point, it would be shown that in thousands of instances resigned officers were allowed transportation in kind. This allowance could only have been based upon superadditions to the law of travel-pay, or "special decisions" under it, by departmental authority, and must be

taken as another fact in conflict with the theory that the denial of travel allowances to resigned officers is in conformity with uniform immemorial usage.

The following are such illustrations of the practical construction of the law as we have been able to obtain under the requirement of this court:

Practical construction of the law by the Departments as to what officers are entitled to travel-pay, referring to pages of the argument.

Officer resigning on account of wounds allowed it. (26.)

Officer resigning to accept promotion and subsequently discharged at his own request entitled. (27.)

Officer discharged on surgeon's certificate *presumed* to be entitled. (14.)

Officer tendering resignation on surgeon's certificate of disability, allowed it. (39.)

Officer tendering resignation on surgeon's certificate of disability, not allowed it. (39.)

Soldier honorably discharged entitled, under the contract, whether performing the travel or not. (23.)

Officer *not* performing the travel in going to place of residence not entitled. (16.)

Officer discharged and offered transportation, declining to go to his home, entitled if he declined for the purpose of rendering service to the Government; otherwise not entitled. (29.)

Officer mustered out at expiration of term, allowed it. (41.)

Officer of same regiment, mustered out at same date, at expiration of term, but retained in service nearly a year after expiration of term, requesting correction of his record, so as to show the period he actually was in service, not allowed it. (42.)

Officers discharged in accordance with their signified desire, not having been allowed travel-pay when joining their commands, therefore not entitled when discharged. (24.)

Officer dropped from the rolls for offense committed entitled. (22.)

Officers tendering resignation to make room for veterans, not entitled. (66.)

Officers discharged, whose services are not needed, are allowed it. (General Orders 79 and 82 of 1865, page 54 of the argument.)

* How far has statute law governed these varying departmental decisions, or what irresistible immemorial usage is established by them affecting the rights of my client, perhaps the Assistant Attorney General can satisfactorily explain. I am thankful that the task is not mine.

Soldier discharged and re-enlisting, entitled. (13.)

Soldier discharged to re-enlist not entitled. (28.)

Soldier dishonorably discharged entitled to travel-pay. (30;) *ergo*, *officer*.

A soldier discharged at his own request under order of June 8, 1830, not entitled. (11.)

Soldier discharged at his own request, *not on account of sickness*, *before* expiration of term, *not* entitled, (18.)

Officer and soldier discharged *before expiration of service* not entitled, (28.)

Officer furnished transportation part way to place of enrollment entitled to travel-pay for the remaining distance. (17.)

Officer discharged and his expenses paid part of the way to his residence entitled to travel-pay for the remainder. (29.)

Officer discharged at his own request, at Washington, residence Harper's Ferry, entitled to it from Fort Kearny, Nebraska. (33.)

Officer so discharged at same place, residence Texas, not entitled. (33.)

Officer so discharged and not allowed travel-pay, afterwards allowed it. (34.)

Travel-pay an *emolument* under the contract.

Mileage not an emolument, but reimbursement; *ergo*, not convertible as substitute for travel-pay. (17–21.)

Officer honorably discharged and allowed travel-pay,

afterwards refused it, and, without order to travel, allowed mileage, which is less than travel-pay. (35.)

Officer so discharged and, without orders involving travel, allowed mileage, and afterwards allowed travel-pay instead. (35.)

Officer mustered out for unfitness, not allowed it. 36.)

Officer resigning, not allowed it. (36.)

Officer resigning, or otherwise discharged, under act July 15, 1870, entitled. (43.)

Officers resigning under the act of July 15, 1870, and fact not referred to in order accepting resignation, not entitled. (43.)

Officers resigning under act July 15, 1870, and not entitled to one year's pay under said act, not entitled to travel-pay. (44.)

NOTE TO PAGE 2 OF ARGUMENT.—Act of January 29, 1813, section 15, relates to volunteers called into service for late war with Great Britain for one year, unless sooner discharged.

Act of July 5, 1813, section 1 (3 Stats. p. 4) authorizes the President to retain five of the regiments in service for a longer period; and section 2 of the act placed them on the same footing of the regular army. It would seem that neither of these laws is now in force.

Act of March 3, 1815 (3 Stats., 225) fixes the military peace establishment. Section 4 of this last act fixes the compensation of the army upon the basis of the compensation fixed by the act March 16, 1802. (2 Stats., 137.) Turning to section 24, we find the precise language used in the 15th section of act of 1813. The act of 1815 seems to have superseded that of 1813, and hence we find the latter act marked "obsolete" on margin of Statutes at Large.

The departments, however, seem to base travel-pay on the act of 1813, and their decisions have led us into the error.

If what we here say be true, the law actually in force has received no departmental construction. The provisions in both laws are the same; but a department which overlooks a live law and construes a dead one can hardly be trusted to establish an interpretation which is too sacred to be disturbed by the courts.

Supreme Court of the United States.

DECEMBER TERM, 1868. No. 245.

THE UNITED STATES

vs.

JOSEPH M. PRICE.

REPLY TO SUPPLEMENTAL BRIEF OF THE UNITED STATES.

The Attorney General suggests certain points, which we notice:

FIRST. He says that isolated instances of payment of travel allowances to resigned officers will not contradict the communications of the Auditors, Comptroller, and Paymaster General.

We answer—

1. The communications are not properly in evidence, and to give to them in this trial the weight of absolute verity would violate every principle which has hitherto governed this Court, and would open a means of defense in future, both to government and citizen, which would lead to the greatest embarrassment, engraft upon this Court a course of practice unwarranted by law, usage, or the rules of court.

2. The isolated instances of refusal to pay are certainly not more weighty to prove usage than the isolated cases we give of payment to show there was no uniform usage.

We do not dispute the correctness of the records as purporting to be certified, but we dispute the verity of every statement of the officers alluded to in their letters to Assist-

ant Attorney General Talbot put into the Attorney General's brief supplemental. They need only to be read to show that they do not pretend to state facts beyond the individual cases cited by them. Everything beyond this is argument.

SECOND. It is suggested that our instances are of payments by paymasters, and to make them effective we must show subsequent allowance by the accounting officers. We reply—

1. The cases we cite were in many instances passed upon by the accounting officers, and in all of them we assert that there has been no stoppage made against paymasters. This is susceptible of proof if we could make it here.

2. Furthermore, if paymasters, being experts and specially charged with the duty of paying accounts, are found to pay travel allowances to resigned officers one day and the next refuse them, is it not some proof that the usage was not uniform or seemed not to be known? It is not a question whether the paymaster and the Comptroller were wrong—it is a question whether there is and has been, for a long period of years, a uniform, well-known, long-acquiesced-in usage binding in law. This we have fully set forth in the argument.

THIRD. It is suggested that a discharge at the request of an officer is not a discharge in the sense that term is used in the law.

We have fully met the point, it is believed, in the argument. But we suggest—

1. Discharge is a word having a plain meaning. There is no obscurity about it. It is not a technical word, needing elucidation from experts. It must be given a natural and free rendering, unless something shows it to have been used in a restricted sense. There is nothing showing this, and the Court cannot first presume it to have been used in a restricted sense and then presume what that sense was.

2. The theory here advanced as to the meaning of "discharge" is an afterthought with the Attorney-General and

with all the officers of the Government who have sent in arguments to this Court.

There is not to be found a single decision among all those given in argument based upon this theory of a discharge.

The Paymaster General, who sends in a report full of animus, overlooked the point entirely in his first report of December 31, 1870, and afterwards sent another January 3, 1871, suggesting this theory.

The Attorney General in his first brief had no such idea of a discharge, and spoke of soldiers, as well as officers, leaving the service at their own request.

The report of the Adjutant General, December 12, 1867, (p. 14 of Attorney General's brief,) originally furnished the Court of Claims, makes no mention of this new doctrine. If any such notion prevailed in the army, he would be the best informed upon the subject.

But we have seen, as shown in argument, that a discharge by resignation differs in no sense from a discharge not asked for; and we have seen that the law and orders specially allow discharges by this means.

3. The Attorney General says that his theory is manifest from a reading of the act in question, which speaks of a discharge as a mode of leaving the service open both to soldier and officer, and he concludes that because the officer can resign and the soldier cannot, therefore the law must have meant the discharge which he defines.

We think the Attorney General overlooks the fact that it is not here a question of *resignation*—it is a question of leaving the service *at the request of the soldier or officer*. We have seen that the doctrine as to travel-pay applies to both, and there are almost as many decisions in the one case as in the other. The truth is, neither the officer or soldier has the right to leave the service on his own motion, and this we have fully shown. The officer manifests his desire in the matter by what is termed *a resignation*, and in military parlance this applies only to an officer; while the soldier manifests his desire by a request—it may be in like form, but it

is not called a resignation. This is a distinction without a difference, but well understood in army life. Thus we have in case of officers what is called "a leave of absence," and the same thing as to soldiers is called a "furlough."

The suggestion as to the meaning of a "discharge," given by Paymaster General Brice, is the suggestion of an *advocate*, and the same may be said of opinions given by the Comptroller.

4. But if anything is claimed to rest upon this theory of the Attorney General as to the meaning of "discharge," it can only be available on *proof* that there was a usage in the Department, well understood in the army and of long standing, giving this technical meaning to the word; and there is no proof of this, and can be none. The fact is otherwise.

FOURTH. The Attorney General suggests—

"A uniform understanding of the Government * * * that for the full term of service (for instance, during the war) there is to be travel-pay only at its commencement, and again at its close."

We reply—

There is no such "uniform understanding," either by the Government or by the soldier and officer. It is not a question of length of service, and is not treated so by the Government; for where an officer or soldier leaves the service on the motion, unaccompanied by his own request, of the Government at any time, whether after one, two, or three months' or years' service, the travel-pay is not withheld. There may be a dozen successive discharges of soldiers or officers filling the same place, and yet they get travel-pay, unless a resignation or request to leave the service is interposed.

The reasoning given by the Attorney General in this connection we have answered in argument.

FIFTH. The Attorney General suggests—

That "officers and soldiers entering the service for a limited period intended to complete their full term of service,

unless sooner 'discharged by reason of death' or wounds incurred in service." "They did not contemplate voluntary resignation during that term, and took no note of minor conditions of such resignation."

We answer—

1. Probably officers and soldiers entered the service without determining to resign; but what of that? Resignations and discharges other than by death or wounds are incidents of the service which are determined by the facts at the time. The law remains the same. Soldiers and officers did not intend to be killed or wounded, but we suppose their intention does not change the question of right to pay of various classes.

2. Precisely what is meant by presuming that soldiers and officers "took no note of any *minor* conditions of such resignation," we cannot see. If the question of travel-pay is a *minor* one, let the Attorney General confess judgment and end the controversy. The Departments seem to regard this condition a *major* one, and the officers concur in this view and insist upon having the law pronounced.

But admitting with the Attorney General that officers did not take note of this *minor* matter of travel-pay, is not admitting that they knew of any rule denying it In this, as in everything else pertaining to pay, they had a right to look to the *law;* and furthermore, if they had spent as much time as we have in the argument of the case, they would have been driven to the law to know anything about its interpretation, for we have only found that there is no fixed, uniform, unchanging rule on the subject.

SIXTH. The Attorney General injects an extract from the opinion of the Court of Claims to show negatively that it did not appear in trial whether or not Price contracted his disability in service.

We reply—

1. This is not in the findings, and is but an expression of what did not appear; whereas the findings do show that

Price "tendered his resignation based on surgeon's certificate of disability," and was honorably discharged thereon.

In just such a case the Department has paid. (See argument, p. 39.)

We think it a fair presumption that the disability was contracted in service, and this in like cases and under like orders is always the presumption of the administrative officers of Government.

2. The extract shows that the War Department reported to the Court of Claims "that the claimant was honorably discharged the service, his discharge having been granted on a surgeon's certificate of disability." This would seem to imply more than a presumption such as we have suggested may reasonably be raised, and the fact that it does not appear beyond this whether the disability was contracted in the line of duty, does not disturb the reasonable presumption.

SUGGESTIONS MADE BY ACCOUNTING AND OTHER OFFICERS.

It is something new in this court to be called upon to answer arguments sent in at trial by officers of Government who made the erroneous decision brought for review here.

We do not object specially to this, but respectfully submit that there is strong need of discriminating between the fact and fiction now in the record. As arguments, we find no fault with the reports alluded to, but to receive them as facts we think wholly unwarranted.

We cannot notice these reports in detail. The points made in them are all anticipated, we think, in the argument prepared before the Attorney General's brief on second hearing was put in our hands.

We submit a word, however.

SECOND COMPTROLLER.

FIRST. The Comptroller says when his office was established, the practice of disallowing travel-pay to resigned officers had been long adopted.

We reply—

1. There is not a particle of evidence in the case of any character that there was such rule previous to 1813. Doubtless the Comptroller thinks his statement true, but that does not make it true. We have seen that, as to the practice or rulings since 1813, the same statement is made, yet we have shown different modifications of the rule and its indefiniteness and variableness. No more than this can fairly be presumed for the practice of earlier years, and presuming this, they are not sustained by principle in denying the claim here made.

2. We see in next paragraph of Comptroller's report, (p. 3, Attorney General's brief,) that the Paymaster General paid travel pay to Ensign Longacre, 6th Virginia militia, he having voluntarily retired from service by resignation. This payment was disallowed by the accounting officers. Now, what does this prove? If anything, it proves that the Paymaster General did not then take the view of the law afterwards taken by the Comptroller. If we can indulge inferences, the only fair one is, that the Paymaster General, who had theretofore paid without supervision by accounting officers, construed the law as we do; and it proves also that the usage must have been theretofore to pay as we claim should now be done. So that we have strong reason to believe that the rule, as laid down now by the Department, originated with the Comptroller, and was opposed to the former rule. What, then, becomes of the present Paymaster General's assertion as to the rule in his own office before his time? When this officer and the Adjutant General speak of "immemorial usage," they speak at random. They do not know the legal signification of "immemorial."

Immemorial means beyond memory, extending beyond the reach of record or tradition.

Paymaster General Brice was in his nurse's arms when his predecessor in the Pay Department paid Ensign Longacre on a construction of the law we now urge.

SECOND. The Comptroller says that the construction and usage were as well known as the laws, for more than half a century, and the officer tendering his resignation must be presumed to have known the condition on which it would be accepted; and he adds that if the Government had known the officer did not so believe, it would have kept him in service.

We reply—

1. The usage was not known.

2. The usage has varied, and Government officers administering the law did not know the rule.

3. It is absurd to suppose that a General in the field in accepting a resignation and discharging an officer, acted with reference to saving travel-pay.

4. It is equally absurd to suppose that an officer would have been retained in service from such paltry considerations.

THIRD. The Comptroller suggests the inconvenience of opening old accounts as a reason for refusing to pay this one. We reply—

1. The inconvenience of paying what ought long ago to have been paid to A, is no answer to paying B, who is not of that ancient period and has a present case in court.

2. The resignations occurring in our small army in former years were few, and it does not follow that because Price is paid the Department would be called upon to go back fifty years and look up old cases. Besides, this a matter which need not concern the Comptroller. His duties are defined by law and not by his idea of convenience. He speaks of these accounts as "innumerable," but we must allow him some latitude of expression, for he speaks from vague impressions.

3. As to officers who resigned to go into the rebel army, we can reassure the Comptroller, for a law of Congress protects the Treasury from all such. Besides, if this were not so, we are quite unable to see why you should refuse pay to a

Union officer, because in doing so you establish a principle favorable to a rebel officer. Laws are no respectors of persons.

The Comptroller mentions the point as to a discharge not being a discharge; but this we have noticed.

He concludes by sending *two* decisions—one made in 1819 and the other in 1864, both of which are given in argument, (pp. 17 and 24.)

THE THIRD AUDITOR.

This officer says: "During and since the Mexican War the practice of the Government has been uniform upon this question," (p. 5, Attorney General's brief.)

To this we reply that the Auditor is mistaken if he means by *uniform* what the law requires. This officer, like the others, uses language without considering its true meaning. "Uniform" means consistent with itself at all times; not different; conforming to one rule; agreeing with each other. Can this be said of the law of travel-pay, as expounded by the Departments?

The Auditor submits—

1. Case of Lieutenant Tully, First Regiment Illinois Volunteers, who resigned during the Mexican War, and claimed travel-pay. The correspondence shows that the matter was an open question then. It shows, too, that there are circumstances which entitle a resigned officer to travel-pay, and this destroys the uniformity claimed by the Auditor. We ask examination of this case, (pp. 6–7, Attorney General's brief.)

2. Next case is Lieutenant John S. Day, Seventh Regiment New York Volunteers, who was discharged during same war upon "an expression of a wish to retire from service." (See p. 7.) The same Auditor had doubt in Day's case, and referred it to the Comptroller. He was denied pay.

3. The case of J. B. Davis, a soldier, is the case of claim for three months' extra pay—not travel-pay, (p. 8.)

4. The case of Henry Robinson is given so briefly that little can be gleaned from it, (p. 9.)

These four are all submitted by the Auditor as occurring prior to the late war.

They show that the claim was persistently pressed, and was not acquiesed in.

5. Next is case (p. 9) occurring in 1869. Auditor disallows—"such allowances never being paid in the case of a resigning officer." This is disproved in several cases. (See argument.)

6. Next is case occurring in 1867, (p. 9–10,) and decision is the same.

This is the complete showing from this officer.

PAYMASTER GENERAL.

FIRST. The Paymaster General reports that it has been the unvaried practice to deny traveling allowances to officers resigning, and that during his service of twenty years this has been fixed and settled. The Paymaster General is mistaken. We have shown that recently, in his own office, there have been many variations of the rule, and by the case of Longacre cited to establish the antiquity of the ruling in his department. We have seen that the then Paymaster General took a different view. He then asserts that the rule has been of "such long duration and unvarying uniformity, and so complete the acquiescence in it of all concerned, that the records fail to show any cases to the contrary or wherein the principle is contested or controverted." (See Attorney General's brief, p 11.)

Either the Paymaster General is wofully ignorant or he inadvertently misstates the facts. The case of Longacre referred to contradicts him; the cases submitted by the Attorney General and ourselves contradict him; the practice of his own office, under a recent act of Congress, contradicts him.

SECOND. He then asserts that "there is no want of provision, explicit or plainly implied, for the payment of traveling allowances to officers and men, of all branches of the service, after honorable discharge, at the expiration of their

terms, (1) or before such expiration when discharged for sickness (2) or wounds incident to service, (3) or when discharged because the Government no longer needed their services." (4) But where is the warrant of law for making these subdivisions?

THIRD. He suggests that officers disabled from sickness or wounds are bountifully and tenderly provided for by the medical staff, and if injuries are temporary the officer is healed and restored to duty; but if permanent, the medical officer, at the proper time, certifies to the fact, and the officer is honorably discharged on this certificate; and this he asserts to be the *modus operandi* of immemorial usage.

This may be true in time of peace and with a small standing army; but that it is true in time of war and a sudden and large increase of military forces, as in the late war, is not true, and no one acquainted with the active operations of the army would say that it could possibly be true. He adds that "a resignation on surgeon's certificate of disability is a solecism and a thing he never heard of before in all his army experience."

To this it is a sufficient answer that such a resignation is common in time of war; and, that it is unknown to the Paymaster General illustrates how little of active army life a very competent bureau officer may know.

FOURTH. The Paymaster General suggests other considerations, which he is pleased to term answers to the "logic of counsel;" but they are not new, and we pass them over.

FIFTH. The Paymaster General concludes his bristling argument with what seems to have been reserved as its climax, viz: that this suit is brought for the benefit of grasping attorneys rather than the true beneficiaries.

If anything were wanting to show the unreliableness of any report sent by this officer, we think this gratuitous fling would supply it. He knows that no assignment of any claim can be made; he knows also that under the law attorneys do not receive the money of officers and soldiers; he knows that the fees attorneys are to receive are prescribed

by regulations; he knows that great complaint has been made as to the administration of travel-pay law, and that, yielding to this complaint in some cases, officers discharged on resignation have had their orders changed so as to give them this travel-pay; he knows that individual officers have appealed to him in this behalf; what then, we ask, can be his motive but to prejudice the Court and blind them to the real issue. He forgets that courts come out of the bar, that attorneys are officers of the Court. We believe your honors will suppress this interjection as an impertinence to the Court.

ADJUTANT GENERAL'S REPORT.

We observe nothing not already noticed either in Adjutant General Townsend's report or Assistant Adjutant General Vincent's report. This is to be noticed, however, and it is important that neither of these officers is willing to commit himself to the recent and absurd theory, now for the first time put forward, that an officer discharged at his request is not discharged.

We have thus epitomized the Attorney General's brief, and the arguments of accounting officers which he appends and makes part of his brief. We think it manifest that as to the *facts*, which alone the Court desired, nothing uniform, definite, well-known, and acquiesced in, and of long standing can be derived from what we have thus reviewed, and that as to the *arguments* of these officers, they are quite as incongruous and confused.

The Court cannot fail to observe that with the whole necessary force of the War Department and its bureaus, the Treasury Department and its bureaus, scarcely a tithe of facts has been sent in from that source compared with those which we have discovered, working at great disadvantage. Whether we should infer a "*suppressio veri*" we are not willing to say; but it is evident that the whole truth has not been submitted to the Court by the Government.

CHIPMAN & HOSMER,
Of Counsel.